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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	19
I. THE DECISION BELOW CONFLICTS WITH GOMILLION v. LIGHTFOOT, 364 U.S. 339 (1960), AND THE OTHER APPLICABLE DECISIONS OF THIS AND OTHER COURTS REGARDING THE CHARACTERISTICS OF UNCONSTITUTIONAL RACIAL GERRYMANDERING.	22
II. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT REGARDING THE BURDEN OF PROOF IN CASES SHOWING RACIAL AND VOTING DEPRIVATIONS.	27
III. THE COURT OF APPEALS MISCONSTRUED WHITCOMB v. CHAVIS, 403 U.S. 124 (1971) AND WRIGHT v. ROCKEFELLER, 376 U.S. 52 (1964), IN CONSIDERING THEM DETERMINATIVE OF THIS CASE.	31
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	Page
Anderson v. *Martin*, 375 U.S. 399 (1964)	28
Burns v. *Richardson*, 384 U.S. 73 (1966)	22
Bussie v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D.La. 1971), modified, ____ F.2d ____ (5th Cir. 1971), petition for cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784)	23
Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972) (No. 70-13)	29
Drum v. *Seawell*, 250 F. Supp. 922 (M.D. N.C. 1966) (three-judge court)	23
Fairley v. *Patterson*, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969)	20, 21
Fortson v. *Dorsey*, 379 U.S. 433 (1965)	22
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960)	22, 23, 25, 26, 31
Harper v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966)	29
Hunter v. *Erickson*, 393 U.S. 385 (1969)	28
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969)	7
Kramer v. *Union Free School District*, 395 U.S. 621 (1969)	29
Loving v. *Virginia*, 388 U.S. 1 (1967)	28

TABLE OF AUTHORITIES (Continued)

Page

Marsaw v. *Patterson*, Civil No. 1201, S.D. Miss., consolidated with *Fairley* v. *Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967), rev'd sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969) 6

McLaughlin v. *Florida*, 379 U.S. 184 (1964) 28, 29

Perkins v. *Matthews*, 400 U.S. 379 (1971) 20

Reynolds v. *Sims*, 377 U.S. 533 (1964) 23, 29

Sellers v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966) (three-judge court) 24

Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court) 23, 24, 26

Sincock v. *Gately*, 262 F. Supp. 739 (D.Del. 1967) (three-judge court) 12, 24

Smith v. *Paris*, 386 F.2d 979 (5th Cir. 1967), affirming 257 F. Supp. 901 (M.D.Ala. 1966) 24

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) .. 22

United States v. *Mississippi*, 380 U.S. 128 (1965) 19

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 3, 31, 32

Wright v. *Rockefeller*, 376 U.S. 52 (1964) 3, 23, 31, 32

Other Authorities

28 U.S.C. § 1254(1) 2

42 U.S.C.

§ 1971 7

§ 1971 (a) (1) 4

TABLE OF AUTHORITIES (Continued)

Page

§ 1973 ..... 4, 7

§ 1983 7

Miss. Code § 2870 (1956 Recomp.) 5, 20, 30

A. deGrazia, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (Praeger: New York, 1962) 12

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1971

No.

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 6, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 453 F.2d 455, the

opinion of the United States District Court for the Southern District of Mississippi is unreported, and both opinions are reproduced in the Appendix attached to this Petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 6, 1972, and subsequently a timely petition for rehearing or, alternatively, for rehearing *en banc* was filed. The petition for rehearing was denied, and after a poll of the court at the request of one of the judges, the petition for rehearing *en banc* likewise was denied on February 25, 1972. This petition for certiorari is being filed within ninety days of the denial of the petition for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners are challenging a redistricting plan which restructures the boundaries of the five county supervisors' districts of Adams County, Mississippi (47.9 percent black) to insure that no more than one of the five districts contains a black population majority, substantially diminishes the voting strength of blacks in that one district, and cancels out the voting strength of blacks dispersed throughout the other four districts. The questions thus presented are:

1. Whether manipulation of election district boundaries on the basis of race by abandoning pre-existing

district lines and crossing neighborhood boundaries to disperse a heavily black population concentration (here, old District Four) among four new election districts and thereby maximizing the number of white majority districts and minimizing the number of black majority districts constitutes unconstitutional and unlawful racial gerrymandering.

2. Whether the burden of proof should have been shifted to the defendants to show that the new boundary lines not merely were rational or logical, but that they were necessary to redistricting and that no less burdensome alternatives were available.

3. Whether the court of appeals erred in holding that *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), governed the outcome in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Fifteenth Amendment:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1971(a)(1):

> (a) (1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

42 U.S.C. § 1973:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

STATEMENT OF THE CASE

In Mississippi each county is governed by a five-man board of supervisors which exercises executive, legislative, and quasi-judicial powers (such as jury selection) and whose members are elected from five supervisors' districts required to be equal in population by state law. Miss. Code § 2870 (1956 Recomp.). The court of appeals' decision sustains as nondiscriminatory a racial gerrymander of the boundaries of the five supervisors' districts of Adams County, Mississippi — a county which is 47.9 percent black — which insured that no more than one black representative (if indeed it is possible to elect one) can be elected to the county's five-man governing board of supervisors, or to other offices elected on a district basis, justice of the peace and constable.

The petitioners (hereinafter designated plaintiffs) are two black Adams County voters, one a candidate for the board of supervisors in the 1971 general election, who were displaced by the defendants' November 2, 1970 redistricting plan from District Four, the only majority black district in the county, and placed in new majority white districts where, because of bloc voting along racial lines in the county (Tr. 16-17),[1] they and those similarly situated are unable to elect any blacks or to be elected to public office.[2] The re-

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[1]The abbreviation "Tr." refers to pages in the Trial Transcript.

[2]Subsequent to the redistricting plaintiff Leon Howard moved his legal residence back into new District Four to run, unsuccessfully, as an independent candidate for the District Four seat on the board of supervisors.

spondents (hereinafter designated defendants) are the Adams County Board of Supervisors and its members who are charged under Mississippi law with the duty of establishing equi-populous supervisors' districts and who adopted the challenged redistricting plan.

1. This case is another step in the continuing efforts by Adams County officials to inhibit the constitutional rights of the plaintiff class to free and equal political participation. Prior to the passage of the Voting Rights Act of 1965, few black citizens of Adams County were permitted to register and vote (App. 11a).[3] Subsequent to the enactment of the Voting Rights Act, when black voters had gained a majority in Supervisor's District Four, the Adams County Board of Supervisors abolished election of its members on a district basis and in 1967 all five supervisors were chosen on an at-large basis, with all the county voters voting for all the candidates, thus returning to office another all-white board (Pre-Trial Stipulation, ¶¶ 12, 15). The switch to at-large supervisors elections subsequently was enjoined for failure of the defendants to obtain clearance under Section 5 of the Voting Rights Act of 1965[4] and when clearance was sought the Attorney General objected to the change as racially discriminatory (Complaint, Ex. D).

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[3]The abbreviation "App." refers to pages in the Appendix filed with this Petition.

[4]*Marsaw* v. *Patterson*, Civil No. 1201, S.D. Miss., consolidated with *Fairly* v. *Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967), rev'd sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), temporary injunction issued, April 23, 1969.

Having failed in their effort to dilute black voting strength by contriving at-large elections, the defendants contracted with a Mississippi planning agency, Comprehensive Planners, Inc. (CPI), to redistrict the county and on November 2, 1970 adopted a new plan redistricting the county's five supervisors' districts. After an examination of the characteristics and effects of the plan, the plaintiffs on May 5, 1971, filed this class action challenging the redistricting plan on the grounds, inter alia, that it was racially discriminatory in violation of the rights of black voters and candidates for office secured by the Fourteenth And Fifteenth Amendments to the United States Constitution and implementing Federal statutes, 42 U.S.C. §§ 1971, 1973 and 1983.[5]

2. The evidence shows that prior to the redistricting, the population and racial composition of the Adams County supervisors' districts was as follows (1970 Census figures):

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[5]Other counts in the complaint involved the failure of the United States Attorney General to make a specific finding that the redistricting plan was nondiscriminatory when it was submitted to him pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Count I), and the malapportionment of the supervisors' districts which resulted from the redistricting (Count III), the latter of which was sustained by the District Court. According to the statistics provided by the defendants, as judged by 1970 Census data, the November 2, 1970 redistricting plan resulted in new districts ranging from 10.12 percent under-represented to 12.03 percent over-represented, a span of 22.15 percentage points, a malapportionment clearly unconstitutional under the standards set out in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

Old District	*White*		*Black*		*Total*
1	9,305	(68.5%)	4,265	(31.4%)	13,590
2	668	(62.3%)	403	(37.6%)	1,073
3	1,040	(69.7%)	448	(30.0%)	1,492
4	3,695	(24.5%)	11,356	(75.3%)	15,074
5	4,658	(76.8%)	1,393	(23.0%)	6,064
	19,366	(51.9%)	17,865	(47.9%)	37,293

Black majority District Four, with 15,074 persons, was twice the population norm of a correctly apportioned district (7,459). The most logical and economical plan (which would have done the least violence to pre-existing district boundaries) would have been to split old District Four into two new districts (which would have had black majorities) and to combine other districts to establish new districts with the following results:

Old District	*Population 1970 Census*	*Population New Dist.*	*Pop. Under or Over Norm*	*Percent Variance*	*Percent Black*
4	15,074	7,537 (two new districts)	+ 78	+ 1.05%	75.3%
1	13,590	7,332 (two new districts)	—127	— 1.70%	31.8%
2	1,073				
	14,663				
3	1,492	7,556 (one new district)	+ 97	+ 1.30%	24.4%
5	6,064				
	7,556				

Instead of relying upon pre-existing boundaries which would have provided an adequate basis for a new redistricting plan, the defendants completely abandoned pre-existing district lines in favor of a plan which dispersed the black population of old District Four among four new districts.

3. Under the challenged plan, the population of black majority District Four was split four ways. The less politically active rural area, together with some territory from adjacent District Five, became new District Four with a substantially diminished black population percentage. The urban area of old District Four, containing the most politically active black voters, was divided up among three of the new white majority districts. The result was that the percentage of blacks in new District Four was substantially decreased, and the more than 6,700 black persons who were excluded from new District Four had their votes cancelled out by being dispersed throughout white majority districts where they would be out-voted by white bloc voting in every election:

New District	*White*	*Non-White*	*Total*
1	3,586 (54.6%)	2,976 (45.4%)	6,562
2	4,466 (60.2%)	2,955 (39.8%)	7,421
3	4,183 (50.9%)	4,031 (49.1%)	8,214
4	2,288 (33.2%)	4,602 (66.8%)	6,890
5	4,843 (59.0%)	3,363 (41.0%)	8,206
	19,366 (51.9%)	17,927 (48.1%)	37,293

(Trial Ex. P-12)

This population dispersal had a clearly discriminatory effect on black voting strength in the new districts. In each district in Adams County the number of black registered voters as a percentage of the black population invariably is disproportionately lower than the number of white registered voters as a percentage of the white population (Pre-Trial Stipulation, Ex. H). Thus, although new District Three is almost half white and half black by population, there can be no doubt that the district has a white registered majority. Even more significantly, the black registered majority of District Four, which prior to the redistricting was 62.8 percent of the total number of registered voters in that district (id.), was reduced by the redistricting to an estimated 50 percent of the total in new District Four (Tr. 91). Thus, while the defendants had the opportunity to redistrict the county to provide black registered majorities in two of the five districts, with the attendant possibility of electing blacks to the board of supervisors and other district positions, under the redistricting plan which they adopted none of the five districts contained a black registered majority, with the possible exception of new District Four in which a clear-cut black registered majority of 62.8 percent was all but eliminated.

This is the classic case of maximizing the number of districts returning safe majorities for whites and minimizing the number of districts returning safe majorities for blacks by dispersing the black majorities

as much as possible and gathering together white voters to create new white majorities.[6]

Instead of utilizing 1970 Census data (available in published form in early 1971), Comprehensive Planners at the same time the 1970 Decennial Census was being taken (April 1, 1970) counted the occupied houses in Adams County and multiplied occupied houses by a housing occupancy factor (average number of persons per occupied housing unit) to locate persons in Adams County and to arrive at a "population estimate" as a basis for redistricting. Far from being "colorblind" (App. 32a), the defendants and their planning agents were exceedingly race-conscious in designating all occupied houses on a house count map according to the race of the occupants — white homes marked in red and black homes in green (Pre-Trial Stipulation, Exhibits F and G) — with racial designations supplied by the defendants or their employees (Tr. 202-07, 304-14 and passim). The housing occupancy factors used as multipliers also were differentiated according to race, although it was conceded that the racial statistics for housing occupancy used (1960 Census data) were not an accurate method of estimating 1970 population (Tr. 205-06) and the use of this technique resulted in malapportioned supervisors' districts.

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[6]See A. de Grazia, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (Praeger: New York, 1962), quoted with approval in *Sincock* v. *Gately*, 262 F. Supp. 739, 829 (D.Del. 1967) (three-judge court).

4. The locations and shapes of the boundaries of the new districts indicate an intentional manipulation of district lines to disperse black voters. Prior to the redistricting, only two of the five districts penetrated the corporate limits of the City of Natchez, where blacks constitute a majority of the city population and where most of the black voters in the county live (see Figure 1).

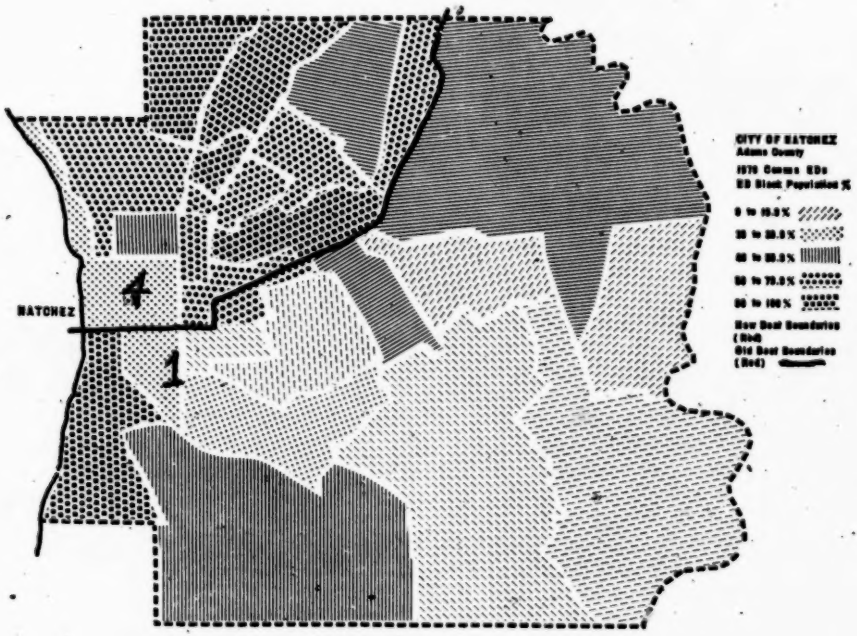

Figure 1. Map showing the boundaries of supervisors' districts (beats) within the City of Natchez prior to redistricting, superimposed on 1970 Census enumeration districts shaded for racial percentage.

As a goal of the new redistricting plan, the population concentration in Natchez (majority black) was consciously and intentionally "split up ... between the districts" (Tr. 214-15). The new district lines, rather than following neighborhood patterns, cut across neighborhood lines to disperse the black population formerly contained in District Four among four of the five new districts (see Figure 2).

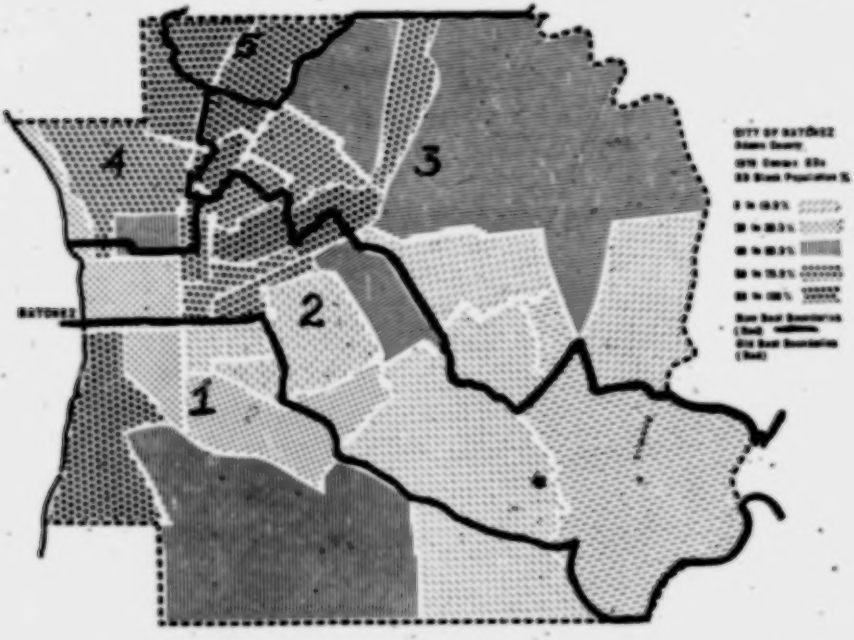

Figure 2. Map showing the boundaries of supervisors' districts (beats) within the City of Natchez as established by the challenged November 2, 1970 redistricting plan, superimposed on 1970 Census enumeration districts shaded for racial percentage.

5. Each of the new district lines spread out from Natchez like spokes from the center of a wheel, combining black population concentrations in Natchez with white population concentrations in the county, sacrificing any semblance of compactness or contiguity (see Figure 3).

Figure 3. Outline map of the boundaries of the supervisors' districts in the city and the county established by the challenged November 2, 1970 redistricting plan, showing the distorted boundaries lacking compactness and contiguity, including the "giraffe" shape of District 2 (county and city) and the "turtle's head" shape in District 5 (city map).

New District Two is a giraffe-shaped district with more than 70 sides, nearly 50 of which are found within the City of Natchez, takes three pages to describe, and zig-zags a tortuous path from the Mississippi River on the north across the county to the Wilkinson County boundary on the south. Similarly, new District Five spans the county in zig-zag fashion from the Franklin County boundary on the east to the Steirs Lane area, where that portion which gobbles up portions of the black population of old District Four resembles a turtle's head. It was admitted by defendants' own planner that the district shapes in the City of Natchez were not compact or contiguous (Tr. 273) and defendants failed to establish any non-racial justification for the shape or location of those lines.

6. The uncontradicted and largely admitted facts show that the redistricting has a disastrous effect on the voting strength and political power of black voters in Adams County. Those residential areas in the city and county containing the most politically active black citizens were displaced from District Four and removed to white majority districts. The only black officials to be elected to office in Adams County in this century, the District Four justice of the peace and constable elected in 1967, and all the officers and members of the board of the NAACP county branch (the county's only civil rights organization) were displaced from District Four and settled in new white majority districts. On the other hand, the planners consciously and intentionally as a goal of the redistricting plan drew the boundaries so that none of the incumbent white supervisors, illegally elected as part of the at-

large election scheme in 1967, were displaced from the districts they were elected to represent. As a result, another all-white board of supervisors was returned to office in the elections of 1971.

Both plaintiffs testified without contradiction that black candidates could not win office in any of the new districts, except in new District Four as a remote possibility (Tr. 50-51, 90), and plaintiffs' expert witness testified that the redistricting plan was, in his opinion, a racial gerrymander diluting and minimizing black voting strength (Tr. 150). Finally, there is nothing necessary or "inevitable" (App. 63a) about the shape or location of the new district lines; the defendants' planning expert himself testified that there were "a number of ways that lines can be drawn in any given county situation" (Tr. 284).

The district court found that the defendants' redistricting plan on the undisputed 1970 Census figures resulted in districts malapportioned by a span of 22.15 percentage points variance from the norm and ordered them to submit a new plan by December 1, 1971 providing for equally apportioned districts, but held that "plaintiffs have failed upon the facts and the law to establish any gerrymandering to dilute the black voting strength in District 4 or any other district of Adams County" (App. 29a). The district court refused to enjoin the use of the challenged redistricting plan in the 1971 primary and general elections (App. 50a), and the Fifth Circuit concurred but in an interlocutory order required new elections for supervisor positions af-

ter district court approval of a constitutional redistricting plan in 1972 (App. 53a).

On plaintiffs' claim of racial discrimination, the court of appeals, without discussion of the elements of proof of plaintiffs' case, recognized that the black voters formerly residing in District Four were disadvantaged by being placed in new districts with white majorities (App. 63a), but declined to hold either that the redistricting constituted a racial gerrymander or that the proof thrust on the defendants the burden of showing that the new lines were required by a compelling state interest and that no less burdensome alternatives were available.

Although a new election for supervisor positions is required by the Fifth Circuit's Order of July 29, 1971, this case is not moot, and plaintiffs seek review of the decision of the court of appeals for the following reasons. Since both the district court and the court of appeals refused to enjoin the use of the challenged plan in the 1971 elections, the defendants' November 2, 1970 redistricting plan established the boundaries of Adams County supervisors' districts for the election of county supervisors, justices of the peace, and constables in that major election year. Both the district court and the court of appeals denied plaintiffs' prayers in their complaint for a declaratory judgment that the November 2, 1970 redistricting plan was racially discriminatory (which would have the effect of barring its use as the basis for future plans) (Complaint, ¶ 22 (a)) and for an injunction against the defendants barring future racial gerrymandering (id. at ¶ 22(b)). If this Court should review and reverse the decision

of the court of appeals, plaintiffs would be entitled to this future relief. Further, because of malapportionment, the interlocutory order requires new elections only for county supervisors, but not for other county officials elected in 1971 on the basis of the gerrymandered districts, specifically, justices of the peace and constables. If the district court and court of appeals erred in holding that the districts used as the basis for the 1971 elections were not gerrymandered, plaintiffs would press their claim in this Court for new justice of the peace and constable elections as well.

REASONS FOR GRANTING THE WRIT

This case represents a continuation and further stage of what this Court early identified in *United States* v. *Mississippi*, 380 U. S. 128, 135 (1965) as the "long-standing, carefully prepared, and faithfully observed" effort in Mississippi to bar black voters from the effective use of the franchise. Although as a direct result of the Voting Rights Act of 1965, black voter registration in the state has increased from 28,500 (pre-1965) to an estimated 268,000 (28 percent of the total), only seven black county supervisors (of a total of 410) in six counties (out of 82) have been successful in gaining elective office.

This exclusion of blacks from county governing boards in Mississippi cannot be attributed to accidental or adventitious circumstances. Shortly after the passage of the Voting Rights Act of 1965 the Mississippi Legislature enacted legislation, ostensibly for the purpose of meeting one man, one vote requirements, to

allow county boards of supervisors to switch from a district system of electing members to at-large voting, with all the voters of the county voting for all the members of the board. A number of Mississippi counties, including Adams, took advantage of this opportunity to dilute the voting strength of blacks who had attained a registered majority in particular supervisors' districts (in Adams, District Four) but who were in the minority county-wide. In *Fairley* v. *Patterson*, No. 25, O.T. 1968, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), this Court noted the potential for dilution of black voting strength inherent in this new device in requiring that it be submitted to the United States Attorney General for his approval pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Upon submission of the 1966 Amendment to Miss. Code § 2870 the Attorney General entered an objection on the ground that this new law had the purpose and effect of denying and abridging the right to vote on account of race (Complaint, Ex. D).

At-large elections having been eliminated as a device for diluting black voting strength, racial gerrymandering of district lines now appears as one of the greatest current threats to free exercise of the franchise by black voters in Mississippi. Last term in *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971), this Court noted the findings of the United States Commission on Civil Rights that since the passage of the Voting Rights Act "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters" in the South. There appears to be a growing move-

ment in Mississippi on the part of all-white boards of supervisors to use their constitutional obligation to establish equally apportioned districts as a cover to gerrymander district lines and disperse concentrations of black voting strength, thus assuring all-white county governments in most parts of the state.[7]

The essential issue presented in this case is whether this Court's decision in *Fairley* and the Attorney General's subsequent objection are to remain effective barriers to unconstitutional dilutions of black voting strength, or whether those decisions may be undermined by the use of the new technique of racial gerrymandering which, by combining black majorities with greater white majorities through manipulation of district boundaries, minimizes or wipes out the gains achieved in the prior litigation.

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[7]In 1971 the United States Attorney General, through his delegated agent the Assistant Attorney General in charge of the Civil Rights Division, entered objections pursuant to Section 5 of the Voting Rights Act to county redistricting plans submitted by seven Mississippi counties on grounds that it was impossible to determine whether the new redistricting plan diluted black voting strength or that study revealed that the submitted plan made the effect of diluting black voting strength without compelling justification. Significantly, redistricting plans in four of these counties were devised by Comprehensive Planners, Inc., of West Point, Mississippi, the planning agent of the defendants in the case at bar.

I. The Decision Below Conflicts With Gomillion v. Lightfoot, 364 U.S. 339 (1960), And The Other Applicable Decisions Of This And Other Courts Regarding The Characteristics Of Unconstitutional Racial Gerrymandering.

Prior to its decisions in the reapportionment cases, this Court held in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), that a complaint alleging that the boundaries of a municipality had been altered from a regular geometrical shape to an "uncouth twenty-eight-sided figure" excluding most of the black voters from majority black Tuskegee, Alabama, stated a cause of action for violation of rights secured by the Fourteenth and Fifteenth Amendments. *Gomillion* thus stands for the proposition that racial gerrymandering — the manipulation of election district boundaries for the purpose or effect of diluting black voting strength — violates Federal constitutional and statutory voting guarantees. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 311 (1966). *Gomillion* and the dicta of the subsequent reapportionment cases indicate that to establish unconstitutional racial gerrymandering, it is not necessary to produce direct evidence of evil motives or racial motivation: apportionment schemes are unconstitutional when they "designedly or otherwise ... operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966).

The court of appeals appears to have been in general

agreement with the plaintiffs on these fundamental legal principles, but failed properly to apply the principles of the racial gerrymandering decisions to the facts of this case. This Court and other courts have identified the following characteristics — the symptoms of the disease — as indicating prohibited racial gerrymandering:

1. History of prior racial discrimination in voting. *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D.Ala. 1965) (three-judge court).

2. Departing from historic and previously established boundary lines. *Gomillion* v. *Lightfoot*, supra; *Sims* v. *Baggett*, supra, 247 F. Supp. at 109.

3. Dispersing concentrations of black voters throughout several districts with the effect of diluting black voting strength. *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 457 (E.D. La. 1971), modified, ____ F.2d ____ (5th Cir. 1971), petition for cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784).

4. Lack of geographic compactness and contiguity in the new districts. *Gomillion* v. *Lightfoot*, supra; *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964); *Drum* v. *Seawell*, 250 F. Supp. 922, 925 (M.D. N.C. 1966); cf. *Wright* v. *Rockefeller*, 376 U.S. 52, 59-74

(dissenting opinions of Douglas and Goldberg, JJ.).

5. Combining territories with compact black majorities with territories containing white majorities and thus converting black voting majorities into white voting majorities. *Sims* v. *Baggett*, supra, 247 F. Supp. at 109; *Smith* v. *Paris*, 386 F.2d 979 (5th Cir. 1967), affirming 257 F. Supp. 901 (M.D. Ala. 1966); cf. *Sincock* v. *Gately*, 262 F. Supp. 739, 829 (D.Del. 1967) (three-judge court).

6. Perpetuating whites in office, while at the same time excluding blacks from the opportunity of being elected. Cf. *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966) (three-judge court).

This listing is not exhaustive, but merely identifies the principal characteristics of racial gerrymandering. Some of these elements taken alone, or several in combination have been held sufficient in the cited cases to show a violation of Equal Protection Clause and Fifteenth Amendment guarantees.

The critical significance of this case is that on the admitted and undisputed facts set out in the Statement of the Case, ALL of the above-stated characteristics of unconstitutional racial gerrymandering are present.

Given the distribution of population in Adams County, it is doubtful that the defendants could have achieved a more devastating dispersal of black voting strength to minimize the voting power of the black residents remaining in District Four and to cancel out the voting power of those excluded from District Four. Plaintiffs Howard and Schoby, and the class they represent, (like the plaintiffs in *Gomillion,* supra) were by this dispersal of the black population denied the right to vote in the one district in which their vote could be effective — the district in which they constituted a majority prior to redistricting — and where they could run for office with some possibility of success and elect black candidates if they so chose. The court of appeals failed to discuss or justify any of these characteristics of racial gerrymandering, established by the undisputed facts, in its decision. Rather, the court of appeals rested its decision on what it considered was a failure of proof.

First, the court of appeals held that the record was "bare" of any evidence showing that the redistricting plan was the product of a racial motivation or purpose (App. 61a), and thus appears to hold that such prohibited racial motivation must be shown by some direct evidence of improper motive or racial bias on the part of the defendants. After years of civil rights litigation, those who are bent on denying constitutional rights have learned to be quiet about it, and thus to require direct evidence of improper purpose is not only impossible in most cases, but is not even necessary, as the cases cited by the court of appeals and noted above have established. Proof of an "inescapable ef-

fect of discriminating against Negroes" in voting has been held sufficient to show prohibited racial motivation, since the defendant public officials knowing what they have done must have intended the natural and inescapable effects of their actions. *Gomillion* v. *Lightfoot*, supra; *Sims* v. *Baggett*, supra, 247 F. Supp. at 109-110.

Second, the court of appeals rejected plaintiffs' contention that the redistricting plan was unconstitutional by relying on the fact that blacks retained a majority in new District Four (although substantially diminished) and that they had swelled in population in the other districts. This analysis is defective because it uses as the basis of comparison the unconstitutional circumstances prior to redistricting. Although blacks previously had a majority in only one district, District Four, their population was sufficiently large that, in the language of the reapportionment cases, District Four voters were "constitutionally entitled" to two supervisors, not one. The redistricting plan, which dispersed this second black majority among three new white majority districts, thus robbed those black voters of the opportunity to elect a second black supervisor which they would have had if the redistricting had been accomplished on a fair and non-racial basis — by dividing old District Four in half, providing for two black majority districts.

As to racially balancing the other districts, achieving a racial balance may be a significant remedy against discrimination where schools or juries are involved, but providing racial balance among election

districts in a black minority county where racial bloc voting prevails has the disastrous and inherently discriminatory effect of cancelling out the voting strength of the black minority with the overwhelming white vote.

This is not to say that under any circumstances black voters in a 48 percent black county are constitutionally entitled to two black majority districts. What we are saying is that prior to the redistricting, according to the district boundaries that obtained then, plaintiffs and the plaintiff class resided in a majority black district large enough to elect two supervisors, that this pre-existing circumstance may be taken as a non-racial standard against which the challenged redistricting may be judged. The fact that the defendants did not consider or adopt a redistricting plan which recognized this pre-existing level of black voting strength, but rather adopted a plan which dispersed the black population concentration formerly included within old District Four among three new white majority districts, thus diminishing the effectiveness of their votes, shows purposeful racial discrimination and a constitutionally impermissible dilution of black voting strength.

II. The Decision Below Conflicts With The Applicable Decisions Of This Court Regarding The Burden Of Proof In Cases Showing Racial And Voting Deprivations.

The court of appeals in judging the facts failed to apply the proper constitutional standard because, hav-

ing determined that black voters in Adams County were disadvantaged by being "shifted ... to districts in which they may no longer be in the clear majority," (App. 63a), it failed to hold that the burden of proof was shifted to the defendants to establish a compelling justification for the new district lines. Shifting the burden of proof to the defendants was required first, because the evidence established a prima facie case that defendants had employed a racial classification in redistricting, dispersing the black population of old District Four and using express racial designations in computing population figures (red for white homes and green for black homes); second, because the redistricting plan disproportionately burdened the effectiveness of the voting strength of the county's black population, thus infringing the exercise of a fundamental constitutional right; and third, because the redistricting came on the heels of an immediate prior history of discrimination in voting, thus making the new electoral mechanism which diluted black voting strength presumptively unconstitutional.

The decision of the court of appeals directly conflicts with the numerous decisions of this Court holding that both racial classifications and electoral mechanisms which abridge the effectiveness of the franchise — particularly the voting rights of racial minorities protected by the Fourteenth and Fifteenth Amendments — are "constitutionally suspect" and "bear a far heavier burden of justification than other classifications." *Hunter* v. *Erickson*, 393 U.S. 385 (1969), *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), *Anderson* v. *Martin*, 375 U.S. 399 (1964)

(racial classifications); *Dunn* v. *Blumstein*, 40 U.S.L.W. 4269 (U.S Mar. 21, 1972) (No. 70-13), *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966), *Reynolds* v. *Sims*, supra, 377 U.S. at 561-62 (voting deprivations).

Under this "strict scrutiny" standard, which the court of appeals should have applied, the defendants should have been required to show that the boundaries of their redistricting plan were (1) necessary, (2) were required by a compelling state interest, and not merely "logically" drawn (as the district court erroneously held (App. 22a)) or rationally related to redistricting, and (3) that there were no available alternatives which could have accomplished redistricting without the attendant dilution of black voting strength. See *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *McLaughlin* v. *Florida*, supra.

If the court of appeals had placed the burden of justification on the defendants, it is unlikely that the redistricting scheme could have been sustained, particularly in light of the testimony of defendants' expert witness that "there are a number of ways that lines can be drawn in any given county situation" (Tr. 284) to achieve districts of equal population and in light of the possibility that equi-populous districts could have been obtained merely by subdividing District Four without diluting black voting strength.

The court of appeals also failed to give any weight to the admitted proof that none of the defendants' stated goals of their redistricting had been achieved

by the challenged plan. The defendants have claimed throughout that the new boundaries were justified to achieve equality in population, road mileage, and area of each of the new districts (App. 57a). However, the new districts resulted in inequalities in population ranging from 10.12 percent under-represented to 12.03 percent over-represented (a span of 22.15 percentage points) (App. 20a), disparities of road mileage from 59.0 miles to 74.7 miles (Plan, p. 6), and disparities of area from 45 square miles to 152 square miles (a disparity of 107 square miles, 9 square miles greater than the disparity under the pre-existing districts) (id.).[7] The fact that the redistricting did not achieve even its stated goals[8] is both probative of racial motivation and evidence that the challenged redistricting fails to withstand the required "strict scrutiny."

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[7]Supervisors' districts are not required to be equal in road mileage or area either by state law, Miss Code § 2870 (1956 Recomp.) or the Constitution. These criteria were injected because of the traditional district unit system of county management in which each supervisor is responsible for maintaining county roads and bridges within his own district, a system which has been condemned as wasteful and inefficient by the General Legislative Investigating Committee of the 1972 Mississippi Legislature.

[8]Only the unstated goal, that of retaining each incumbent supervisor in his respective district (Tr. 271) was achieved, and that goal is inherently discriminatory under the circumstances of this case.

III. The Court Of Appeals Misconstrued Whitcomb v. Chavis, 403 U.S. 124 (1971) And Wright v. Rockefeller, 376 U.S. 52 (1964) In Considering Them Determinative Of This Case.

In holding that the challenged redistricting plan did not unconstitutionally dilute the voting strength of the complaining minority, the court of appeals relied heavily upon this Court's decisions in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), and *Whitcomb* v. *Chqvis*, 403 U.S. 124 (1971), neither of which is directly applicable to, or determinative of, this case. In *Wright* this Court held that the plaintiffs had failed to show that a Congressional redistricting scheme which established a heavily black and minority group district adjacent to several majority white districts had the purpose or effect of racial discrimination. In this case the opposite was accomplished — rather than concentrate minority voting strength, the defendants here dispersed black voting strength to achieve a dilution of black votes more closely resembling the *Gomillion* gerrymander and which Mr. Justice Black writing for the majority in *Wright* suggested would be vulnerable to constitutional attack (376 U.S. at 58).

Last term in *Whitcomb* the Court refused to strike down an Indiana legislative apportionment scheme providing for multi-member districts because of its adventitious effects upon ghetto voting strength. Contrary to the claims of the plaintiffs here, the plaintiffs in *Whitcomb* conceded that there was no legislative purpose to dilute black political effectiveness.

Neither *Wright* nor *Whitcomb* involved proof of a history of exclusion of blacks from the free exercise of voting rights, the use of racial designations to accomplish redistricting, disparate treatment of white and black office-holders, or the specific question of dilution of black voting strength achieved by the dispersal of the black voting population among several election districts by manipulation of district boundaries. Thus, the court of appeals' reliance on those decisions presents an urgent case for granting the petition for certiorari because this case presents important questions relating to the deprivation of voting rights which were not settled by the Court in those cases and which should be resolved.

* * * * *

The decision of the court of appeals bodes ill for the future of black political participation in Southern states because it accepts as "inevitable" redistricting which unnecessarily disperses black voters throughout white majority districts, thus robbing them of the opportunity to elect black representatives if they so chose. The court below, by deciding the case summarily and without oral argument, turned a deaf ear to the political realities of the situation. If the decision of the court of appeals is allowed to stand, the newly enfranchised black voters of Adams County, Mississippi, will find themselves once again without an effective voice in the political process, for it is axiomatic in American politics that submerging an identifiable interest group — particularly a constitutionally protected minority — so that it is denied the opportunity

to elect representatives in proportion to its voting strength is as harmful to the group's members as not permitting them to vote at all.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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April, 1972

APPENDIX

A. OPINION OF THE DISTRICT COURT

Filed: Jul. 20, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

REVEREND LEON HOWARD and BARNEY SCHOBY, Individually and on behalf of all others similarly situated

Plaintiffs,

CIVIL ACTION

versus

No. 1352

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and ELMORE REDD, as Members of the Adams County Board of Supervisors,

Defendants.

MEMORANDUM OPINION

This suit was filed in equity for declaratory and injunctive relief against the enactment, administration or enforcement of a county redistricting plan adopted by the Board of Supervisors of Adams County, Mississippi on November 2, 1970, and in all other Mississippi counties similarly situated, different from those in

force or effect on November 1, 1964, which the plaintiffs contend are unenforceable for failure of the counties involved to obtain "proper clearance of new redistricting schemes as required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973(c)." In addition, plaintiffs seek declaratory and injunctive relief against the administration and enforcement by the Adams County Board of Supervisors of the redistricting plan enacted on November 2, 1970, as racially discriminatory and violative of rights secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1971, 1973 and 1983. Jurisdiction is based on 28 U.S.C. §§ 1343, 2201 and 2202, and 28 U.S.C. §§ 1971(d) and 1973(j) (f). Inasmuch as this action was in part brought under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, a Three Judge District Court was requested and constituted by the Chief Judge of this Circuit.

Each of the plaintiffs is described in the Complaint, and allegations of fact relating specifically to each are then made. Each plaintiff sues in his own behalf and on behalf of all other persons similarly situated. The Complaint, as originally filed on May 5, 1971, is framed in two Counts, each containing several photographs. Subsequently, a "Stipulation of Amendment to the Complaint" affecting some of the introductory paragraphs and a part of Count I was filed by the parties. Additionally, the plaintiffs filed an "Amended Motion to Amend Complaint" on June 17, 1971 just five days prior to the trial of this case in which they asked for

leave of Court to amend their Complaint by adding a third Count consisting of four additional paragraphs charging malapportionment of the five new supervisors' districts in Adams County, which was objected to by the defendants and on which the Court reserved ruling during this trial, but permitted the parties to proceed with proof relative to proposed Count III of the Complaint. All of the above pleadings as well as the defendants' Answer are hereinafter summarized.

One of the two named plaintiffs, Reverend Leon Howard, is a black resident citizen of Natchez, Adams County, Mississippi. In the Complaint he is alleged to be a registered voter and fully qualified for, and presently intends to qualify and run as a candidate for the Adams County Board of Supervisors in the 1971 primary and/or general elections in Mississippi. The evidence adduced at this trial shows that he has decided to run as an independent candidate in the general election, rather than in the Democratic primary. Prior to the challenged November 1970 redistricting of Adams County he resided in District 4 and allegedly intended to run for that District's Supervisor's post. After the redistricting his home was placed in new District 2. He testified during the hearing of this case on its merits before this Single Judge District Court that he has moved back into District 4 and will be a candidate for Supervisor's District 4 as an independent in the general election.

The other named plaintiff, Barney Schoby, is also a black resident citizen of Natchez, Adams County, Mississippi, who is a registered voter in Natchez and

Adams County and who prior to the complained of redistricting resided in Supervisor's District 4 but as a result thereof now resides in District 5.

Although the plaintiffs in Paragraphs 1 and 6 of their Complaint sued for and on behalf of a class of voters and candidates for county supervisor positions in each county in Mississippi which seeks to enact or administer a redistricting of county supervisors' districts different from the district boundaries in force or effect on November 1, 1964, namely, all black citizens who seek or intend to qualify and run as candidates and/or are registered voters qualified to vote for candidates for the post of county supervisor in the 1971 primaries and elections for the county board of supervisors of each county in Mississippi which seeks to enact and administer any redistricting of county supervisors' districts different from those in existence on November 1, 1964, and in Paragraph 7 of Count I of the Complaint sued a defendant class composed of county boards of supervisors and their members in all counties in the State of Mississippi who seek to enact or administer any redistricting of county supervisors' districts changing the district boundaries in existence on November 1, 1964, the parties hereto subsequently filed a "Stipulation of Amendment to the Complaint" in which they agreed, subject to the approval of the Court, which was given, to amend Paragraphs 1 through 13 thereof as follows:

"1. To delete such portions of the Complaint which state that plaintiffs sue on behalf

of a class of voters and candidates for county supervisor positions in each county in Mississippi which seeks to enact or administer any redistricting of county supervisor's districts different from the district boundaries in force or effect on November 1, 1964, and to amend the complaint as to Count I to define the plaintiff class in the same manner as defined in Paragraph 15 of the complaint;

"2. To delete such portions of the complaint which state that the action is against a defendant class composed of county boards of supervisors and their members who seek to enact or administer any redistricting of county supervisor's districts different from the district boundaries in force or effect on November 1, 1964, and to amend the complaint as to Count I to characterize the action as only against the Adams County Board of Supervisors and its members in their official capacities; and

"3. That the caption of the action be amended accordingly."

Therefore, the two named plaintiffs Howard and Schoby are presently prosecuting this action for and on behalf of themselves and all other black citizens of Adams County, Mississippi who seek or intend to qualify and run as candidates therein in the 1971 primaries and elections for the county board of supervisors and/or are registered voters qualified to vote

for candidates for the post of county supervisors in Adams County, and against the Adam County Board of Supervisors and its members in their official capacities, all of whom are white resident citizens of Adams County, Mississippi.

The substance of Count I (Paragraphs 6-13) of the Complaint, which resulted in the constitution and convening of a Three Judge District Court composed of Honorable Charles Clark, U. S. Fifth Circuit Court of Appeals Judge, Honorable Dan M. Russell, Jr., U. S. District Court Judge, and the author of this opinion, which initially began hearing this case, was that the defendants had failed to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Specifically, plaintiffs alleged and contended that although the Adams County Board of Supervisors fully complied with § 5, that the Attorney General of the United States failed to apply the proper standards or make the proper findings required by that section of the Voting Rights Act, "including, but not limited to, failing specifically to make a finding that the dedistricting proposals do not have the purpose or effect of denying or abridging the right to vote on account of race or color". Plaintiffs therefore prayed for the convening of a Three Judge Court pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284, and requested that this cause be advanced on the docket for an expeditious hearing, both of which requests were granted. They further asked that the redistricting plan of Adams County not be put into effect until and unless the proper requirements of § 5 had been complied with and that the Three Judge Court issue a preliminary and then

a permanent injunction enjoining the Adams County Board of Supervisors and all persons acting in active concert or participation with them from administering, enforcing or otherwise putting into effect the November 2, 1970 redistricting plan or any other new redistricting plan from that in force or effect on November 1, 1964, until Adams County instituted an action in the United States District Court for the District of Columbia and obtained a declaratory judgment that the plan would not have the purpose or effect of denying or abridging their right to vote on account of race or color or until the new redistricting plan is resubmitted to the Attorney General of the United States followed by a specific finding by him that the plan did not have the purpose or effect of denying or abridging the right to vote on account of race or color.

In addition to answering and denying all of the allegations contained in Count I of the Complaint, the defendants filed their separate Motions to Dismiss Count I and To Dissolve the Three Judge Court on the ground that the defendants and the Attorney General of the United States had fully complied with the § 5 requirements inasmuch as the Attorney General of the United States through his assistant of the Civil Rights Division on March 3, 1971 wrote to the defendants' attorney, stating in part: "The Attorney General will not at this time interpose any objection to the implementation of the changes proposed in the redistricting plan ..."[1]

The Three Judge Court which was convened on June

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[1]See Exhibit "C" to the Complaint.

22, 1971 at Jackson, Mississippi to hear this case permitted both sides to fully present their cases relative to Count I of the Complaint, and after receiving all evidence and hearing arguments of counsel on Count I, independent of and preliminarily to the trial on the remainder of the Complaint, recessed, conferred, and then reconvened. The Court through the Presiding Judge, Circuit Judge Charles G. Clark of the Fifth Circuit, rendered an oral bench opinion finding that in accordance with the extensive stipulation filed with the Three Judge Court and the many exhibits attached thereto, that the redistricting plan in question was properly submitted to the Attorney General of the United States as required by §5, that the Attorney General, who is presumed to have regularly and legally performed the duties of his office, not only failed to object to the redistricting plan, but specifically stated that he had no objection thereto after having previously requested from, and having been furnished by, the defendants, additional information concerning the racial composition of each of the then existing and newly proposed supervisor's districts of Adams County. This all took place subsequent to the Attorney General writing a letter to the Attorney General of the State of Mississippi on May 21, 1969 objecting to the implementation of an Amendment to § 2870 of the Mississippi Code of 1942 providing for at large elections of members of county boards of supervisors at the option of encumbent boards on the basis that this amendment had as its purpose and effect the denial or abridgment of the right to vote on account of race and color.[2]

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[2]See Exhibit "D" to the Complaint.

Therefore, the Three Judge Court found that the plaintiffs had failed to sustain their burden of proving their allegations in Count I of the Complaint and dismissed it, treating and considering the defendants' Motion to Dismiss as a Motion for Summary Judgment. The Court then exercised its discretion to dissolve the Three Judge Court and leave the remainder of the Complaint and the proposed Amendment thereto to be heard and decided by the undersigned Requesting or Managing Judge who proceeded to try this case after the above dissolution of and adjournment by the Three Judge Court, inasmuch as Count II and the proposed Count III constitute an attack on the exercise of statutory powers as distinguished from an attack on the constitutionality of a state statute of statewide application. *Moody v. Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); *Dyer, et al v. Rich, et al*, 259 F.Supp. 736 at 739 (N.D. Miss. 1966).

Count II of the Complaint purports to state a class action. Each plaintiff sues on his own behalf and on behalf of the class which he alleges to represent, namely, all Black residents of Adams County who presently intend to or who will in the future qualify and run as candidates in the primary or general election for the post of a member of the Adams County Board of Supervisors, and all Black voters of Adams County who are qualified to vote for such candidates. This Court was and is of the opinion that all the requirements for a class action under Rule 23, Federal Rules of Civil Procedure are satisfied, as alleged in Paragraph 8 of the Complaint, and has entered an Order permitting the prosecution of this action before this Court as a class action. In Count II, the plaintiffs al-

lege, and the defendants in their answer filed on May 14, 1971, deny that the redistricting plan unanimously adopted by the defendant supervisors was racially motivated or was enacted for the purpose and effect of diluting the voting strength of Black voters of Adams County, and especially those residing in District 4 as it was constituted prior to the redistricting, or that it discriminated against Black candidates for the posts of members of the Adams County Board of Supervisors, preventing any Black candidates from ever being elected to the Adams County Board of Supervisors, and denying and abridging the right of Black voters to cast an effective vote for Black candidates for the Adams County Board of Supervisors, on account of race and color, all in violation of plaintiffs' rights as secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and by 42 U.S.C. §§ 1971, 1973 and 1983. Stated differently, plaintiffs attack the redistricting of Adams County, contending that the intent, purpose and necessary effect of the newly created districts will be to deny to them and the class which they represent, meaning Negro citizens of Adams County, their constitutional rights, and especially equal protection of the law. They ask this Court to issue a preliminary, and then a permanent, injunction enjoining the defendants and all those acting in concert or participation with them from administering and enforcing or otherwise requiring compliance with the November 2, 1970 redistricting of Adams County and from enacting or seeking to enact any other redistricting plan which has the purpose or effect of denying or abridging the right to vote on account of race or color.

Prior to the passage of the Voting Rights Act of 1965, qualified Black voters in Adams County, Mississippi were substantially disfranchised; however, after its passage a substantial number of Blacks therein registered to vote, as is alleged and admitted in Paragraph 17 of the Complaint. It was established through the testimony of the plaintiff, Howard, that approximately 3,000 black citizens of Adams County registered to vote in 1965 shortly after the passage of the Voting Rights Act, despite the fact that no Federal Registrar was apparently requested, needed or sent therein to assist in the registration of qualified Blacks. Furthermore, Reverend Howard's testimony established that 500 additional Blacks registered to vote in Adams County approximately two months prior to the trial of this case, and that at this time approximately 50% of the qualified Black electors of Adams County are registered to vote. This Court further finds, based upon the testimony on direct examination of the plaintiff, Barney Schoby, who has been one of the most active members in the voter registration drives and campaigns of Blacks in Adams County and who has belonged to the NAACP since 1964, that no threats or intimidation have ever been made or utilized against any Black qualified elector to prevent him from registering to vote or from voting in Adams County, and that in the 1967 elections, there was the largest turnout of Black voters in the history of Adams County which resulted in the election of a Black Justice of the Peace and a Black Constable from then District 4.

Boards of Supervisors in Mississippi, who constitute the governing body of each county, exercising executive, legislative and quasi-judicial powers, were creat-

ed by the 1890 Constitution of the State of Mississippi. § 170.[3] The Mississippi legislature implemented the Constitutional provision by providing for the manner in which each county should be divided into districts, by the passage of § 2870 of the Mississippi Code of 1942.[4] Before the May, 1966 Amendment, this section

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[3]Section 170 of the Constitution of Mississippi provides:

"Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as 'state highways,' and place such highways under the control and supervision of the state highway commission, for construction and maintenance. The clerk of the chancery court shall be the clerk of the board of supervisors."

[4]The part of this section relevant to the issues herein are:

"Each county shall be divided into five (5) districts; with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

"The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or

of the Code provided that each county should be divided into five districts "with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors", but that the districts then existing should continue until changed. This section further provided that the districts could be changed and altered by the boards, and established the method by which this could be accomplished. This 1966 Amendment provided an alternate method for electing members of the boards of supervisors with all the qualified electors of the county being eligible to vote for each member of the board, but with the provision that each candidate for membership of the board must be a resident of the district which he proposed to represent.[5]

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altered, and setting out in such petition the changes, or alternations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election." (As this section existed before the 1966 amendment).

[5]The pertinent part of this amendment is as follows:

"The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

"If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after pub-

The Voting Rights Act of 1965 passed by the Congress of the United States, became effective on August 6, 1965, and subsequently, the Supreme Court of the United States considered this Amendment to § 2870 in *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1, (1969) and held that the State of Mississippi must comply with § 5 of the Act (42 U.S.C. § 1973c) in securing approval of the 1966 Amendment in the prescribed manner before it could be implemented.

After the *Allen* decision, the Attorney General of Mississippi submitted the amendments to § 2870 to the Attorney General of the United States for his approval and he by letter dated May 21, 1969 (Exhibit D to the Complaint), advised the Attorney General of Mississippi that he did interpose an objection to the implementation of these amendments, which objection has not been withdrawn to date, nor did the State ever request or obtain a favorable declaratory judgment

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lishing notice thereof in a newspaper published in the county * * * once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of boards of supervisors shall so be held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired."

in the United States District Court for the District of Columbia pursuant to the provisions of § 5.

The Board of Supervisors of Adams County was enjoined by the United States Supreme Court from thereafter holding elections for the offices of county supervisors on a county-at-large basis in *Marsaw v. Patterson*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), which was consolidated with *Allen, supra;* however the Supreme Court declined to set aside the November, 1967 elections in Adams County.

The populations of the supervisors' districts in Adams County were so malapportioned prior to November 2, 1970, that in order to hold constitutional elections redistricting was made mandatory under the one-man, one-vote decisions of the United States Supreme Court.[6] The population of districts in Adams County prior to the adoption of the November 2, 1970 redistricting plan varied from 800 residents in District 2 to 16,832 in District 4, based on the 1960 United States Census data, and from 1,073 residents in District 2 to 15,074 in District 4, based on the 1970 U.S. Census data.

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[6]*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), (Georgia's county-unit system); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), (Alabama Legislature); *Abate v. Mundt*, U.S. Supreme Court # 71, June 7, 1971, (Rockland County, New York Board of Supervisors); *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), (Midland County, Texas Commissioners' Court); *Martinolich v. Dean*, 256 F.Supp. 612 (S.D. Miss., 1966), (Hancock County Board of Supervisors).

Therefore, on January 20, 1970 the Adams County Board of Supervisors contracted with Comprehensive Planners, Inc. CPI) to prepare and submit an acceptable redistricting plan for Adams County. Comprehensive Planners, Inc. is a corporation organized on April 2, 1966 at West Point, Mississippi to, among other things, provide, services to public bodies in the field of political redistricting and reapportionment, and which, since its organization, has prepared and presented redistricting plans for 38 Mississippi counties, 31 of which have been completed. Of these 31, 11 have been the subject of Federal Court litigation and 9 of these have been approved by the Federal Courts without change, while the other two required alterations or modifications in order to conform to more recent population figures not available at the time that they were completed. Never before has one of CPI's county redistricting plans in the State of Mississippi ever been challenged or attacked on the basis of discrimination because of race, color or creed. CPI commenced work finally submitting a finalized recommended plan on on the redistricting plan in question in March of 1970, September 2, 1970 although it had on several occasions prior thereto talked to the Board of Supervisors concerning various aspects of the desired plan and had then submitted one previous draft which was revised and resubmitted as draft No. 2 which was the final plan herein accepted and adopted by the defendants.[7] By Order dated November 2, 1970, after drafting 20 precinct lines and designating polling places, the Board of Supervisors approved the final redistricting

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[7]See Exhibit "B" to Exhibit P-1 (Stipulation of Facts).

plan submitted by CPI and authorized and directed its submission to the United States Attorney General for his approval pursuant to the Voting Rights Act of 1965, which plan was expressly not objected to.

When the defendants employed CPI to draft an acceptable redistricting plan, they instructed it to equalize as nearly as practicable (1) the population of the districts, (2) the mileage of roads for county maintenance in each of the districts and the square mile areas of the five districts.

Neither the defendants nor anyone else gave CPI's representatives or employees any instructions touching on the racial makeup of any of the districts to be drawn, asked them to consider the racial makeup thereof, nor to in any manner consider any individuals or groups of individuals or areas of the county in the formulation of the proposed new districts. In its drawing of the new district lines CPI did not consider any racial factors or take into consideration the race of any of the citizens of Adams County or the racial makeup of any particular area, but considered only the factors of population, road mileage and area, as instructed.

At the time of commencement of the preparation of the redistricting plan and up until its final submission and adoption, CPI utilized the 1960 United States Census Bureau figures, inasmuch as the 1970 Census figures did not become available to it or to anyone else until February or March of 1971. The adopted and challenged redistricting plan combined the 1960 "house occupancy factor" of both black and white houses with

its own house count of all occupied houses in the City of Natchez and Adams County to project the 1960 Census figures to an estimate of the 1970 population of Natchez and Adams County, which was a sound, accepted and approved practice for the professional count of population for reapportionment purposes. Using the above method, CPI calculated the population of Adams County to be 39,698 as of the time of the submission of its plan, which included a rural population of 19,422, and a population of 20,267 within the city limits of Natchez, the county seat and only incorporated municipality therein, based on the "household factor". This "factor" was 3.3 Whites per house and 3.6 Non-whites per house in the City of Natchez, and 3.8 Whites and 4.6 Non-whites per house in the rural area.

The total racial composition of the supervisors' districts in Adams County after the adoption of the November 2, 1970 redistricting plan, using the 1960 Census data, is as follows:

Dist. No.	*White*	*Non-White*	*Total*	*Over or Under Ideal*	*% Over or Under Ideal*
1	4,442 (56.2%)	3,459 (43.8%)	7,901	—39	—0.5%
2	4,708 (60%)	3,139 (40%)	7,847	—92	—1.16%
3	4,267 (52.7%)	3,823 (47.3%)	8,090	+150	+1.89%
4	2,606 (33.2%)	5,255 (66.8%)	7,861	—79	—0.9%
5	4,895 (61.2%)	3,104 (38.8%)	7,999	+59	+0.7%
	20,918 52.7%)	18,780 (47.3%)	39,698		

The racial and total composition of supervisors' districts in Adams County after the adoption of the November 2, 1970 redistricting plan, using the 1970 Census data, is as follows:

Dist. No.	*White*	*Non-White*	*Total*	*Over or Under Ideal*	*% Over or Under Ideal*
1	3,586 (54.6%)	2,976 (45.4%)	6,562	—897	—12%
2	4,466 (60.2%)	2,955 (39.8%)	7,421	—38	—0.5%
3	4,183 (50.9%)	4,031 (49.1%)	8,214	+755	+10%
4	2,288 (33.2%)	4,602 (66.8%)	6,890	—569	—7.6%
5	4,843 (59.0%)	3,363 (41.0%)	8,206	+747	+10%
	19,366 (51.9%)	17,927 (48.1%)	37,293		

It will thus be seen that the ideal population or norm in each supervisor's district subsequent to the adoption of the November 2, 1970 redistricting plan, using the 1960 Census data, would be 7,940. The largest variance from the ideal appears in District 3 where there is a total population variance from the ideal of 150, which is 1.89% higher.

Based upon the 1970 Census figures, which did not become available until February or March, 1971, the population of Adams County was determined to be 37,293. Based upon this total figure, the ideal population, or norm, of each district would be 7,459. The largest variance from the ideal appears in District 1 in which there are 897 people below the norm, or a variance of 12% under the ideal, whereas the populations of Districts 3 and 5 are each 10% above the ideal. The calculated variance of District 4, computed on the basis of the 1970 Census figures is 7.6% below the ideal, a span of 22.15 percentage points. The ratio between the largest and smallest districts is 1.25 to 1 based on the 1970 census figures, whereas under CPI's redistricting plan adopted on November 2, 1970, before the 1970 Census figures were available, the population of each new district was within 2% of the norm, the span ranging from 1.89% above the ideal in District 3 to 0.5% below in District 1.

Comparison of the new districts under the adopted plan and road mileage, using a norm of 66 miles of county roads is as follows. District 1 — 74.5 miles; District 2 — 65.0 miles; District 3 — 74.7 miles; District 4 — 59.0 miles; District 5 — 61.5 miles.

The square mile area comparison of the new districts (some of which constituted marshy river areas), with a norm of 20% is as follows: District 1 — 33.9%; District 2 — 14.1%; District 3 — 21%; District 4 — 20.9%; District 5 — 10.1%.

The Certificate of A. V. Davis, Circuit Clerk of Adams County,[8] who also testified herein, reflects that pursuant to order of the defendant Board of Supervisors dated February 16, 1971, that he entered upon the task of transferring all the names of registered voters on the registration rolls of Adams County from Supervisors' Districts existing prior to November 2, 1970 to the new districts, and that the transfer of names was commenced on or about March 10, 1971, through the use of telephone directories, city directories, the knowledge of mail carriers, both within the city and rural, and of members of the Board of Supervisors and based on his own personal knowledge and that of his staff. The actual transfer of the names of registered voters from the old districts to the new was completed on June 4, 1970. Postcards are being addressed to each of the registered voters at their last known addresses advising of the new Supervisor's District, election districts and polling places. Whether a registered voter has been properly transferred will be determined in this manner and the necessary correction on the registration books will then be made. This process was started on June 14, 1971. According to his testimony, no cards were sent to approximately 500 registered voters whose names were purged or eliminated from the poll books when to the knowledge of the elec-

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[8]See Exhibit "P" to the Pre-Trial Order.

tion commissioners and himself they were either deceased or had permanently left the county. While he admitted that there was no meeting of the election commissioners authorizing this purge, and thus it was not done according to law, nevertheless to the best of his knowledge, all whose names were purged or removed were Whites.

Although the defendants had originally ordered a re-registration of all voters in Adams County subsequent to the adoption of the new redistricting plan, based on the request of a group of Blacks, they subsequently revoked this order and did not and do not now require any re-registration.

Adams County, Mississippi has as its western boundary the Mississippi River, and the City of Natchez is the only incorporated municipality therein and is situated on the Mississippi at the approximate center of the western boundary of the county. Former Supervisor's District Nos. 1 and 4 were the only districts whose areas extended into the City of Natchez prior to the redistricting, each of them containing approximately 50% of the municipal population. Supervisor's District 4 has always been the most northerly district in the county, having as its West boundary the Mississippi River and its Northern boundary the North boundary of the county. Since the population concentration of the county is within the city limits of Natchez, it follows that each of the supervisors' districts should logically come into the city in order that the population of the county could be nearly equalized between each of the five districts. Therefore, only the East and Southeast lines of District 4 were required to be changed,

and it was essential and inevitable that approximately one-half of the population of District 4 would be assigned to one or more other districts and that this reassigned population would have to come from areas geographically close to the East and Southeast lines of District 4, in which area Black population strongly preponderates, although there were and are other concentrations of Blacks in other areas of the county. Because of the location and boundaries of Adams County and of the City of Natchez, there was very little maneuvering room in which to meet the exact norm with perfect mathematical exactness.

The Court finds, in accordance with the above Certificate of the Circuit Clerk of Adams County, that based on the new registration books, without possible corrections resulting from the aforementioned method of transfer and without removing any names from the registration books, the following table reflects the number of registered voters by new supervisor's districts and the ratio expressed in percentile that the number of registered voters of each district bear to the total countywide registered voters:

District No. 1	3,625	19.59%
District No. 2	3,803	20.55%
District No. 3	4,310	23.29%
District No. 4	2,859	15.45%
District No. 5	3,909	21.12%
TOTAL	18,506	100.00%

The Court takes judicial notice of the fact that the United States Census is taken every ten years, that the terms of office of supervisors in Mississippi are

four years and that elections therefor are held in the Summer and Fall of 1971 and each fourth year thereafter. Under the circumstances peculiar to this case, reliable 1970 Census figures did not become available to the defendants for purposes of redistricting until February or March of 1971, only a few months prior to the designated times for elections. This situation will recur every 20th year counting from 1971. The Census for the year 1980, the results of which will become available in the spring of 1981, will more accurately reflect the population of each of the then supervisors' districts than would any calculated estimate now available to the parties or the Court and in 1980 the Census will reflect the actual population count of each supervisor's district in Adams County.

Prior to the adoption of the challenged redistricting plan, Supervisor's District 4, which is the principal district in dispute, based on 1960 Census figures, had a total population of 16,832 people, of which 12,053 or 71.6% were Non-white and 4,779 or 28.4% were White; and based on 1970 Census data, District 4 had a total population of 15,074 people, 11,379 or 75.5% of whom were Non-white and 3,695 or 24.5% of whom were White. Under the redistricting plan in question, and based upon the 1960 Census figures, as calculated by CPI, Supervisor's District 4 had a population of 7,861, of whom 5,255 or 66.8% were Non-white and 2,606 or 33.2% are White. The same district, based on 1970 Census data, has a population of 6,890 people, 4,602 or 66.8% of whom are Non-white and 2,288 or 33.2% of whom are White.

Since enactment of the Voting Rights Act in 1965 the registration and election officials of Adams County have denied no person the right to register to vote or the right to vote on account of race or color, and it has never been necessary to request the assistance of Federal Registrars and none have ever been sent into Adams County. The last re-registration in Adams County was conducted in 1956.

Of the total population of Adams County, according to 1970 Census figures, 19,366 are White and 17,927 are Non-white, which results in 51.9% White and 48.1% Non-white (there are only approximately 62 people in Adams County in the "Non-white" category or classification who are not Blacks). Of the total registered voters of Adams County at this time, approximately 11,160 are White and 7,353 are Non-white, or 60.3% Whites and 39.7% Non-whites. Only approximately 50% of the eligible Black voters of Adams County have registered to vote. and the Court finds that the sole reason for this non-registration is lack of interest or complete apathy.

Based on the 1970 Census figures, with the norm of 20% population in each of the five districts, the percentage of population in each of the districts is as follows:

District No. 1	17.6%
District No. 2	19.9%
District No. 3	22.0%
District No. 4	18.5%
District No. 5	22.0%

In computing the population of Adams County for purposes of the redistricting plan, CPI engaged in an actual house count in both the rural areas of Adams County and in the City of Natchez, and as previously stated, had to use different house count factors for white and non-white houses. This was the only reason for distinguishing between them. In arriving at the population figures contained in its plan, CPI had to estimate, and did not actually count each person residing within the county. It reviewed its plan for racial composition in each new district only after the Attorney General of the United States, through the defendants' attorney, requested this information, that is, there had been no determination made or consideration given of racial percentages in the old and new districts before the plan was approved by the Board of Supervisors. It is not, and was not, the policy of CPI to have the percentage of Blacks in each district conform to or reflect the percentage of Blacks in the entire county, but only the factors of population, county road mileage (exclusive of municipal streets within the corporate limits of Natchez which are maintained by the City) and total square mile area were considered in drawing the new district lines.

Although the expert witness, Harold A. Sweency, called by the plaintiffs* criticized the redistricting plan in question and intimated that it constituted a gerrymander in order to dilute or reduce the number of Black voters in District 4 of Adams County, the Court rejects this contention as well as the contention that

*Exhibit P-6 reflects his qualifications, which are very limited in this field.

the drawing of the new district lines was not difficult or complicated, inasmuch as the expert admitted that he had on several occasions attempted to draw new district lines to redistrict Adams County to avoid any unlawful gerrymandering or malapportionment but had never been able to completely and successfully do so despite repeated efforts on his part. The plaintiffs offered no plan or proposed plan of their own, and the Court finds that they were unable to do so because of the extreme difficulty resulting from the physical location and boundaries of Adams County and Natchez, the only incorporated municipality therein, which contained over 60% of the total county population.

It is well established that redistricting provisions which change voting districts for the purpose or with the effect of denying Black voters the right to vote in a district where they constitute a majority prior to the redistricting or with the effect of diluting the vote of the Black electorate are violative of the guarantees of the Fourteenth and Fifteenth Amendments. While plaintiffs and the class which they represent have no constitutional right to reside in new districts wherein they maintained a population majority prior to the redistricting, they do have a constitutional right not to have their voting strength diluted or minimized as a result of an intentional racial gerrymander by the defendant Board of Supervisors. Likewise, if a racially discriminatory effect is proven then courts may infer a racially discriminatory purpose; and in this regard, neither the state nor a political subdivision thereof may constitutionally manipulate election district boundaries so as to produce an effect which mini-

mizes or dilutes the voting strength of Black voters. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110 (1960); *Burns v. Richardson*, 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376, 388 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S.Ct. 498, 13 L.Ed.2d 401, 405 (1964).

The burden of proving an intentional gerrymandering for the purpose of minimizing or diluting the voting strength of Black voters or of denying them equal protection of the Fourteenth Amendment and the rights secured by the Fifteenth Amendment of the United States Constitution is on the plaintiffs. *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). This Court finds as a matter of fact and concludes as a matter of law that plaintiffs have failed to meet this burden of proving that the new district lines were drawn by or for the defendants on racial lines or that the defendants or CPI were motivated by considerations of race, creed or country of origin in creating the new districts. Certainly, Adams County not only had the right, but also the duty, to redistrict because of the extremely malapportioned supervisors' districts that existed. *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968); *Martinolich v. Dean*, 256 F.Supp. 612 (S.D. Miss., 1966). The facts of this case establish that there was no gerrymandering to dilute Black voting strength in District 4, but on the contrary, it was necessary to redistrict Adams County as it was done because of the irregular shape thereof and the fact that its western boundary was the Mississippi River with the City of Natchez being located on the Mississippi, thus requiring all districts to include part of this heavily populated municipality. The

Court further finds that subsequent to the challenged redistricting plan and based upon 1970 Census data, the population of District 4 is still 66.8% Non-white and only 33.2% White; the population of District 3 is 49.1% Non-white and 50.9% White; the population of District 1 is 45.4% Non-white and 54.6% White; the population of District 5 is 41% Non-white and 59% White and the population of District 2 is 39.8% Non-White and 60.2% White. The overall population of Adams County is 17,927 or 48.1% Non-whites and 19,366 or 51.9% Whites. The Court thus finds that the plaintiffs have failed upon the facts and law to establish any gerrymandering to dilute the black voting strength in District 4 or any other district of Adams County; that the effect of the redistricting plan left a Black majority in District 4 and almost equalized it with the White population in District 3. In view of these findings and the absence in the record of any substantial competent evidence by the plaintiffs to meet their burden of proof that qualified Blacks were not freely and lawfully permitted to register or vote since 1965, this Court finds that the allegations of Count II are without basis in fact or in law; that they have thus failed to establish any violation of their constitutional rights inasmuch as they have failed to meet their burden of proving the new redistricting plan, including the new district boundaries, had as its purpose or effect unlawful gerrymandering or invidious discrimination motivated by or because of race, color or creed. *Wright v. Rockefeller, supra.* This Court finds that the adopted and challenged redistricting passes constitutional muster in this regard within the framework of *Connor v. Johnson*, 279 F.Supp. 619, *affd. per curiam*, 386 U.S. 483, 87 S.Ct. 1174, 18 L.Ed.2d 224 (1966), in which the conten-

tion most fervently pressed was that Blacks would be denied a fair opportunity to elect Black candidates to the United States House of Representatives in view of legislative reapportionment of Congressional Districts in Mississippi. The Court in *Connor* stated:

> "We are of the view that the adjudication of this controversy is controlled by Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481." 279 F.Supp. 622.
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> "It has thrice been held by three judge district courts, applying Wesberry, that one factor, and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state and that factor is population."

In *Chavis v. Whitcomb*, 305 F.Supp. 1364 (S.D. Ind. 1969), *revd.* in *Whitcomb v. Chavis*, U.S. Supreme Court No. 92, decided June 7, 1971, the Supreme Court held that a minority race was not necessarily entitled to elect any certain number of representatives, and the plaintiffs had failed to meet their burden of proving that the multi-member district complained of resulted in invidious discrimination because of race, color or creed. In *Whitcomb, supra*, the Supreme Court stated:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general

proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.[34] This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote.[35] There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests.[36] At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country.[37]"

In footnote 34 in *Whitcomb*, the Court made the following observation:

> "Interestingly enough, in Wright v. Rockefeller, 376 U.S. 52 (1964), challenge was to a single-member district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates and save Negro districts. We rejected the challenge for failure of proof, but noted in passing that '... some of these voters ... would prefer more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.' 376 U.S. at 57-58."

In summary, this Court finds that the defendants, acting through CPI, redistricted Adams County in an attempt to comply with the one-man, one-vote rule and did so with an eye that was colorblind, with no intent to gerrymander or deprive plaintiffs or the class that they represent (Blacks and other Non-whites) of any of their constitutional rights guaranteed by the Fourteenth or Fifteenth Amendment or any laws of the United States nor for the purpose of reducing the Black majority in District 4 or diluting the voting strength of Blacks therein or any other district of Adams County; that this was the exercise of a discretionary and required function of the Board of Supervisors under the circumstances existing, and was done without regard to race, color or creed, but solely for the purpose of, and with the desire to, meet the constitutional requirements of the one-man, one-vote requirement because of the extremely malapportioned districts which

existed in Adams County; this redistricting did not reduce the majority population of Blacks in District 4 nor did it reduce the ratio of Black voters below a majority therein; that it increased the percentage of Black population in at least one other district to a percentage over and above the countywide percentage of Blacks to Whites and provided for a substantial percentage of Blacks in each of the other districts of Adams County; that the plaintiffs have not met the burden of proving that all Black voters vote for only Black candidates and all White voters vote for only White candidates but even if this were true, neither the intent nor the effect of the complained of redistricting violated any constitutional right of the plaintiffs or the class which they represent and was not drawn on racial lines and was not motivated by considerations of race, creed or country of origin in thus creating the new districts. *Gomillion, supra,* is not apposite here because the facts therein, namely an effort to take all but four or five of 400 Negro citizens out of a municipality while not removing a single White voter, are certainly distinguishable from the facts of this case and thus the plaintiffs' reliance thereon is misplaced, particularly in view of the very recent Supreme Court opinion in *Whitcomb, supra.*

As previously mentioned herein, the plaintiffs at the eleventh hour filed their "Amended Motion to Amend Complaint" to add an additional Count, Count III, to their Complaint (Paragraphs 23-26) in order to allege on behalf of themselves and all other registered voters of Adams County that the November 2, 1970 redistricting resulted in malapportioned supervisors' districts, and thus denied to plaintiffs and their class rights se-

cured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. In this proposed Amendment to the Complaint, the plaintiffs prayed that this Court issue an injunction enjoining the defendants and all persons in active concert or participation with them from holding or causing to be held primary and general elections for members of the Adams County Board of Supervisors under the November 2, 1970 redistricting plan as described above and enjoin the defendants to apportionment of population among each of the five supervisors' districts of Adams County which is based upon 1970 Census data "which is free of racial discrimination or gerrymandering, and which conforms to the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution" and that they be granted further relief, including their costs of this litigation, necessary expenses hereof, and reasonable attorneys' fees, all of which they seek in their prayer under Count II.

This "Amended Motion to Amend the Complaint" was first called up at the trial of this case on June 22, 1971 five days after it was filed, at which time the defendants objected thereto on the ground that it was not timely filed and that it injected questions of fact and law not contained directly or by inference in the original Complaint. This Court reserved ruling on the objection and permitted both sides to offer evidence on this question of malapportionment during the trial which was concluded on July 23, 1971.

As previously stated, the 1970 Census figures for Adams County, Mississippi became available to the par-

ties in late February or early March of 1971, approximately two months prior to the filing of the original Complaint herein on May 5, 1971. The defendants filed their Answer on May 14, 1971, the plaintiffs and defendants requested an expeditious hearing of this matter which the Court granted by holding a pre-trial conference on June 7, 1971, and tried this case on June 22 and 23, 1971. This Court required an approved pretrial order to be submitted on or before June 16, 1971, and plaintiffs' request for an extension of time to present this Order to June 17, 1971 was granted. On that date, five days prior to the trial date, the plaintiffs filed and served this "Amended Motion" which was called up for the first time during this trial.

All parties were aware that primary elections are to be held in accordance with the law of the State of Mississippi on August 3, 1971. The parties were instructed to submit their proposed Findings of Fact and Conclusions of Law to this Court as well as their briefs in support of and in opposition to this Amended Motion to Amend the Complaint no later than July 14, 1971, on which date the plaintiffs complied, the defendants having done so approximately two days previously.

Although this Court, based upon the foregoing sequence of events, was inclined to sustain the objection of the defendants to the Amended Motion to Amend by adding Count II, nevertheless, within its sound discretion, based on Rule 15(a), Federal Rules of Civil Procedure, which provides that parties may amend their pleadings after responsive pleadings have been filed, with leave of the Court "and leave shall be freely

given when justice so requires," and on the cases and treatises which indicate that this provision should be and has been liberally construed[10] especially in the absence of prejudice to the opposite party by the Amendment or its timing,[11] and in order to adjudicate all issues concerning the redistricting of Adams County, does hereby overrule the objection to the amendment and permits the plaintiffs to Amend their Complaint by adding Count III thereto. Thus, this Court will consider and now discuss all of the evidence offered by the parties in connection with this allegation of malapportionment as well as the applicable authorities which have dealt with this "one-man, one-vote" constitutional requirement.

After determining that federal courts have jurisdiction to consider inequalities in the apportionment of election districts for the election of state legislators, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the United States Supreme Court announced its one-man, one-vote principle in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and in five companion cases decided at the same time. In *Reynolds* the Court held:

> "... the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its leg-

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[10] *Forman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); 3 Moore, Federal Practice, Paragraphs 15.08 and 15.10 (2nd Ed. 1948).

[11] *Roberts v. Williams*, No. 28829 (C.A. 5, April 1, 1970).

islature, as nearly of equal population as is practicable." 377 U.S. 533, 577.

In two other cases, *Swann v. Adams*, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) and *Kilgarlin v. Hill*, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), the Court disapproved legislative apportionment plans with variances of over 10%. In *Kilgarlin*, the span was from 14.84% above to 11.64% below the norm, with a ratio of the largest to the smallest of 1.31 to 1. It was noted that after reconstruction of floterial districts, the ratio would be 1.21 to 1, a questionable variation.

In *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), the Court held that Article I, § 2 of the Constitution requires that states create congressional districts which provide equal representation for equal numbers of people with "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown," and further held that the variances between Missouri congressional districts which varied from the ideal, based on 1960 Census figures, by 2.84% below to 3.13% above the ideal was contrary to the constitutional requirement of equal representation.

The latest Supreme Court pronouncement in this field is found in the case of *Whitcomb v. Chavis, supra*, in which the Supreme Court upheld the Indiana Three-Judge District Court's ordering of statewide reapportionment because evidence, based on 1960 Census figures, showed that one Senate district was overrepre-

sented by 13.68% while another was underrepresented by 14.52% for a total variance of 28.20%, and thus a ratio between the largest and smallest districts of 1.327 to 1; that the House figure variance from one representative district to another was 24.78%, with a ratio of 1.279 to 1. The Court stated that these variations were in excess of, or very nearly equal to, the variation of 25.65% and a ratio of 1.30 to 1 which was held to be excessive for state legislatures in *Swann v. Adams*, 385 U.S. 440 (1967), pointing out that in *Kirkpatrick v. Preisler, supra*, and *Wells v. Rockefeller*, 394 U.S. 542 (1969) variances of 5.97% and 13.096%, respectively, were impermissible for congressional redistricting.

In *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), the Supreme Court applied the one-man, one-vote rule of *Reynolds v. Sims, supra*, to units of local government and rejected the argument that the Commissioner's Court of Midland County, which is equivalent to the Adams County Board of Supervisors, could be elected from districts that sought goals other than equal population. The Court held that local units with general governmental powers over an entire geographic area may not, consistently with the Equal Protection Clause of the Fourteenth Amendment, be apportioned among several-number districts of substantially unequal population, and that the Equal Protection Clause reaches the exercise of state power, however manifested, whether exercised directly or through subdivisions of the state which have the same or similar powers as that exercised by Boards of Supervisors in the State of Mississippi, which are the county governing bodies of the State.

In *Abate v. Mundt*, ____ S.Ct. ____ (No 71, June 7, 1971), a county redistricting case, the U. S. Supreme Court on the same date that it decided *Whitcomb, supra*, held that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, (citing *Avery v. Midland County, supra*). The Court went on to state that "mathematical exactness or precision is hardly a workable constitutional requirement" (citing *Reynolds v. Sims, supra*), but deviations from population equality must be justified by legitimate state considerations, (citing *Swann v. Adams, supra*). In *Abate*, the Supreme Court stated:

> "In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, Sailors v. Kent Board of Education, 387 U.S. 105, 110-111 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. Reynolds v. Sims, 377 U.S. 533, 578 (1964). These observations, along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local gov-

ernment apportionment schemes, cf. Reynolds v. Sims, supra, at 578. Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.

"... In this case, we have no such indigenous bias; there is no suggestion that the Rockland County plan was designed to favor particular groups. It is true that the existence of any deviations from strict equality means that certain districts are advantaged at that point in time; but, under this plan, changing demographic patterns may shift electoral advantages from one town to another.

"The mere absence of a built in bias is not, of course, justification for a departure from population equality ..."

"We emphasize that our decision is based on the long tradition of overlapping function and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built in bias tending to favor particular political interests or geographic areas. And nothing we say today should be taken to imply that even these factors could justify substantially greater devia-

> tions from population equality. But we are not prepared to hold that Rockland County reapportionment plan violates the Constitution, and, therefore, we affirm."

In *Abate, supra,* the facts reveal that for more than a century the Rockland County Board of Supervisors consisted of the supervisors of the county's five towns, resulting in extensive functional interrelationships and intergovernmental coordination between county and towns. Severe malapportionment due to population growth led to court-reapportionment. The proposed plan, challenged by the petitioners, provided for a county legislature of 18 members chosen from five districts, corresponding with the towns, each district being assigned legislators in the proportion of its population to that of the smallest town. The plan produced a total deviation from equality of 11.9%, that is, one district was 7.1% below the norm while another was 4.8% above.

In the case sub judice, the challenged redistricting plan of Adams County adopted by the defendants on November 2, 1970 which was based upon 1960 Census figures, inasmuch as 1970 Census figures were not available at that time, evidenced a variation or range from 1.89% in District 3 above the norm to 1.16% in District 2 below the norm and would have complied with the constitutional requirement.

However, based upon 1970 Census data, the percentage in District 1 is 12.03% below the norm or ideal and in District 3 is 10.12% above or a span or differ-

ence of 22.15% percentage points, with the ratio between the largest and smallest districts being 1.252 to 1. In addition, District 5 is 10.01% above the ideal and District 4 is 7.63% below, with District 2 being 0.51% below.

Even under the more liberal test of *Abate v. Mundt*, which tolerates slightly greater percentage deviation for local government apportionment schemes, namely 11.9% from equality under the particular circumstances of that case, the 22.15% deviation from equality present herein, based on the 1970 Census data, does not in this Court's opinion pass constitutional muster under the one-man, one-vote equal protection provision of the Fourteenth Amendment to the United States Constitution. This is particularly true in view of the fact that the Court in *Abate* emphasized that its decision was based on the long condition of overlapping function and dual personnel in Rockland County government and further stated that "... nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality ..."

Nevertheless, this Court will deny the plaintiffs' prayer for a temporary and permanent injunction to stay or delay the 1971 primary and general elections in Adams County pending a submission of a new or modified plan to comply with the one-man, one-vote rule for the same reasons that the United States Court of Appeals for the Fifth Circuit affirmed the denial of by the United States District Court for the Northern District of Mississippi of a preliminary injunction

prayed for in *Mississippi Freedom Democratic Party v. Democratic Party*, 362 F.2d 60 (1966), and because of additional reasons. This Court finds: (1) that in June, 1965 the State of Mississippi abolished all of its registration requirements other than that the applicant be of the age of majority, have two years' residence in the State and be able to read and write,[12] the voters of Mississippi ratified the necessary constitutional changes on August 17, 1965, and the Attorney General of Mississippi instructed county registrars to use a simple short registration form; (2) the record fails to show any substantial evidence of acts of intimidation or coercion designed to inhibit Blacks from registering in Adams County since 1965, but on the contrary, this Court finds that there has never been any intimidation threats or economic reprisals against Blacks to prevent their registering or voting in Adams County since 1965; (3) a re-registration requirement originally ordered by the Board of Supervisors of Adams County was revoked; (4) the Adams County Board of Supervisors through the agency it employed to produce a workable and constitutional redistricting plan did so based upon the latest available Census figures (the 1960 Census data) at the time of the adoption thereof, November 2, 1970, and this plan was completed prior to availability of 1970 Census figures which did result in a wider variation of population between districts; (5) the redistricting of Adams County was accomplished without the purpose or effect

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[12]See 1965 Amendments to Mississippi Constitution, §§ 244, 241(a) and revisions of Mississippi Code, §§ 3209.6, et seq., and repealed § 3212.7.

of overturning a Black majority in District 4 or in unconstitutionally diluting the Black vote in that district or in any other district, including District 4 or any other district of Adams County; (6) none of the new districts contains any element or segment of the population to the exclusion of or different from any other district, that is, each district includes residents of the rural area of Adams County as well as those residing within the incorporated City of Natchez; (7) although 1970 Census data was available to the plaintiffs since February or March 1971 they nevertheless did not file their suit herein until May 5, 1971, and did not attempt to inject the question of malapportionment until June 17, 1971, just five days prior to the hearing of this matter; furthermore, the Amended Motion to Amend to add Count III to the Complaint was first called up during the trial of this matter on June 22, 1971, the plaintiffs then well knowing that first primary elections were to be held under Mississippi law on August 3, 1971, with less than 30 days remaining from the time set by the Court at the request of the parties for the post trial submission of Proposed Findings of Fact and Conclusions of Law before the primary election date. Equity does not assist those who slumber on their rights; (8) The defendants have adopted the most expeditious method of implementation of the plan with no re-registration requirement but the names of registered voters were transferred from the old to the new district poll books, beginning on March 10, 1971, seven days after the Attorney General of the United States voiced no objection to the implementation of the redistricting plan in question, and this procedure was still incomplete and in progress at the time of the trial of this case at which time the promulgation

of information to registered voters of changes in districts, precincts and polling places still remained incomplete; (9) the first primary election is just around the corner and it would be no small disruption to Adams County or to a political party or to the public when an election is postponed or stayed at the last moment inasmuch as all ballots would have been printed and paid for, ballot boxes and all precincts in Adams County would have been prepared with the names of registered voters transferred in accordance with the redistricting plan, and election managers (commissioner, watchers) for the precincts would have been appointed. As Judge Wisdom pointed out in *Mississippi Freedom Democratic Party, supra,* "Everyone knows that as a political campaign draws to an end, the tempo increases. The candidates' expenses increase. Political intrusions on the public, by television, radio, and sound-truck, increase. At this late date, to postpone the election until September is to subject the candidates and the public to an unbargained for, expensive and exacerbating extension of the current campaign," (10) Complete confusion would result from an attempt, at this late date, to reform district lines and to perform the repetition of the necessary incidental or other ministerial acts, which latter would include the dissemination of new districts, precincts and polling place information to voters for the second time in less than four months; (11) the effort to redraw the district lines would require and result in the splitting of the 1970 Census Enumeration Districts and the calculation or estimate of the population of each part, which even plaintiffs confess would be unavoidable; (12) the plaintiffs were requested to, but

offered, no alternate plan; (13) More or less minor problems include the fact that candidates have qualified since June 4, 1971, according to the present beat lines; new lines could affect their residency qualifications; and there would be difficulty in getting absentee ballots to servicemen and their return before the election.

Weighing competing values and balancing the inconveniences, in view of the foregoing facts and circumstances, the plaintiffs' prayer for a preliminary or permanent injunction to stay or delay the holding of the primary and general elections in Adams County for the year 1971 will be denied. *See Connor v. Johnson*, ____ S.Ct. ____ (June 4, 1971).

This Court has given some thought to requiring a countywide primary and general election in Adams County for 1971. The plaintiffs contend that this Court would be powerless to do so without first complying with Section 5 of the Voting Rights Act, but apparently they are not aware of *Sheffield v. Itawamba County, et al*,, ____ F.2d ____ (Slip Opinion No. 30452, C.A. 5, Feb. 19, 1971), which established that a United States District Judge, as a Federal Chancellor, may formulate a reapportionment plan or order a countywide election without the approval of the Attorney General of the United States or the United States District Court for the District of Columbia, pursuant to § 5 of the Voting Rights Act of 1965. However, this Court feels that it would be more equitable and practicable to permit the primary and general elections to proceed dis-

trict wide in Adams County in 1971. Also see *Connor v. Johnson, supra.*

Nevertheless, the defendants herein shall on or before December 1, 1971, present a constitutionally acceptable revised or modified redistricting plan, based on the 1970 Census figures, which complies with the one-man, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs in Counts II and III of their Complaint have requested that the defendants be required to pay their attorneys' fees. Although the allowance of attorneys' fees is normally predicated upon contract or statutory authorization, this Court, sitting as a Court of equity, does have the inherent power to award attorneys' fees where the circumstances warrant. *Kemp v. Beasley,* 352 F.2d 14, 23 (C.A. 8, 1965); *Smoot v. Fox,* 353 F.2d 830, 832 (C.A. 6, 1965). In the exercise of this equitable discretion in civil rights cases, courts have generally denied the extraordinary relief of awarding attorneys' fees absent a finding of "unreasonable, obdurate obstinacy" on the part of the defendants. See *Bradley v. School Board of City of Richmond,* 345 F.2d 310, 321 (C.A. 4, 1965); *Kemp v. Beasley, supra; Williams v. Kimbrough,* 295 F.Supp. 378, 387, *affd.* 415 F.2d 875 (C.A. 5, 1969), *cert. den.* 396 U.S. 1061 (1970).

In the case sub judice, there is no proof in the record to indicate that the defendants ever acted in bad faith or with unreasonable, obdurate obstinacy, but rather were compelled to redistrict because of the severe mal-

apportionment of their districts and their legal inability to conduct countywide elections. They in good faith employed a competent firm of planners who specialized in redistricting, and neither this firm nor the defendants submitted nor approved, respectively, any plan drawn with any racial considerations in mind, that is, for the purpose or effect of reducing the strength of Black voters in Supervisor's District 4 or diluting their voting strength therein or any other district in Adams County, and were therefore guilty of no unconstitutional gerrymandering. Furthermore, the redistricting plan drawn and approved on November 2, 1970 did comply with the one-man, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment based upon the available 1960 Census data, but only later did it develop that the 1970 Census data resulted in an unconstitutional malapportionment which was never challenged until immediately before the trial of this case. Under the circumstances of this case, this Court is therefore of the opinion and finds that the conduct of the defendants was not malicious, oppressive, or so "unreasonably and obdurately obstinate" as to warrant an award of attorneys' fees under either Counts II or III of the Complaint. Plaintiffs however are entitled to an award for their necessary costs and expenses of filing and prosecuting this action, and they are hereby required to file an Affidavit of Costs herein within 10 days with a copy to be sent to the defendants who will have five days thereafter to challenge said Cost Affidavit if they desire to do so.

A Judgment or Decree conforming with the foregoing Opinion which constitutes this Court's Findings of Fact and Conclusions of Law required by the Federal Rules of Civil Procedure, shall be presented to this Court, approved as to form by attorneys for both sides, within five days after this date, pursuant to the Rules of this Court.

/s/ WALTER L. NIXON, JR.
UNITED STATES
DISTRICT JUDGE

Biloxi, Mississippi
July 20th, 1971

B. Judgment of the District Court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

REVEREND LEON HOWARD, et al.,
Plaintiffs,

versus

CIVIL ACTION
No. 1362

ADAMS COUNTY BOARD OF SUPERVISORS, et al.,
Defendants.

JUDGMENT

This action having come on for hearing before Honorable Walter L. Nixon, Jr., United States District

Judge, on June 22 and 23, and the issues having been duly heard, and a decision having been duly rendered on July 20, 1971.

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. That the relief requested in Count II of the complaint be and the same is hereby denied;

2. That the plaintiffs are granted leave of Court to amend their complaint by the addition of Count III as set out in plaintiffs' Amended Motion to Amend Complaint, filed June 17, 1971;

3. That the relief requested in Count III of the complaint to the extent that it requests the Court to issue an injunction against the defendants from holding or causing to be held primary and general elections under the November 2, 1970 Adams County redistricting plan ending the submission of a constitutionally acceptable redistricting plan be and the same is hereby denied;

4. That the defendants are ordered to present to the Court, with copies to counsel for the plaintiffs, on or before December 1, 1971, a new redistricting plan determining the boundaries of Adams County supervisors' districts, based upon the 1970 Census figures, which complies with the one-man, one-vote requirements of the Equal Protection Clause of the Fourteenth Amendment;

5. That plaintiffs' request for an award of attorneys' fees be and the same is hereby denied;

6. That plaintiffs' request for an award for their necessary costs and expenses of filing and prosecuting his action be and the same is hereby granted, and plaintiffs are required to file an affidavit of costs herein within 10 days with a copy to be sent to the defendants who will have five days thereafter to challenge said cost affidavit if they desire to do so.

7. That plaintiffs shall recover from defendants the taxable costs incurred in this action to date.

8. That the Court shall retain jurisdiction of this cause for the purpose of a hearing on the aforesaid redistricting plan to be submitted by the defendants and for other necessary relief.

ORDERED, ADJUDGED AND DECREED on this the 27th day of July, 1971.

(Signed) WALTER L. NIXON, JR.
UNITED STATES
DISTRICT JUDGE

Approved as to form:

/s/ FRANK R. PARKER
Attorney for the Plaintiffs

(ILLEGIBLE)
Attorney for the Defendants

C. Interlocutory Order of the Court of Appeals.

Filed: July 29, 1971

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2361

REVEREND LEON HOWARD and BARNEY SCHOBY, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER AND ELMORE REE, as members of the Adams County Board of Supervisors,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

BY THE COURT: IT IS ORDERED that appellants' motion for an injunction pending appeal and their al-

ternative motion for an expedited hearing filed in the above styled and numbered cause are hereby DENIED.

IT IS FURTHER ORDERED that the district court's order contained in its memorandum opinion dated July 20, 1971 shall remain in full force and effect subject only to the provisions herein contained.

IT IS FURTHER ORDERED, however, that upon the filing of the redistricting plan for supervisors' districts on or before December 1, 1971, as directed by the district court in its opinion of July 20, 1971, the district court shall expeditiously proceed to hear, determine, and pass upon the merits of such a plan, and if any plan presented is not a meritorious plan, then the district court, with the best information available, shall devise one.

IT IS FURTHER ORDERED that upon the approval of a legally sufficient plan by the district court, and, in any event, not later than May 16, 1972, the district court shall order that a final election be held under the laws of the State of Mississippi in the five (5) respective districts (beats) of Adams County for the selection of a board of supervisors in compliance with the one-man, one-vote mandate of the United States Constitution. Those supervisors elected pursuant to the terms of this order shall assume and hold the offices to which they are elected within thirty (30) days after such election.

IT IS FURTHER ORDERED that the district court shall retain jurisdiction of this cause subject only to the provisions hereof.

We further note, however, that in the absence of the record we do not pass upon appellants' contention that the redistricting of Adams County "was racially motivated and enacted for the purpose and effect of diluting the voting strength of black voters of Adams County, particularly those residing in old District 4, and of preventing the election of black candidates for office in Adams County." This contention will be considered when the case is finally submitted to this court for hearing on the merits.

The mandate shall issue forthwith.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

/s/CLARE F. SACHS
Deputy
New Orleans, Louisiana

D. Opinion of the Court of Appeals.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2361
Summary Calendar*

REVEREND LEON HOWARD and BARNEY SCHOBY, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants-
Cross Appellees,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER AND ELMORE REE, as members of the Adams County Board of Supervisors,

Defendants-Appellees
Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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(January 6, 1972)

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

DYER, Circuit Judge: Howard and Schoby, black citizens of Adams County, Mississppi, filed a class action attacking a county-wide redistricting plan adopted by and for the election of the Adams County Board of Supervisors. The focus of this appeal is the district court's denial of relief of plaintiffs' claim that the new plan is constitutionally impermissible as a racially motivated gerrymander, operating to dilute the voting strength of the blacks of Adams County. We affirm.[1]

Adams County is the southwestern-most county in Mississippi, having as its western boundary the Mississippi River. The only incorporated municipality in the county is the City of Natchez, situated on the river at the approximate center of the western boundary of the county. The total population of the county in 1960 was 37,730, the City of Natchez consisting of 23,791 or 64% of the total population. The ratio of blacks to whies in the county is roughly one to one, 48% black — 52% white. The black population of the county is heavily concentrated in the City of Natchez, with the

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[1]The district court in this case found that the population of the new districts deviated in equality to such an extent that they are unconstitutional under *Abate v. Mundt*, 1971, 403 U.S. 182, and ordered the Board to present a constitutionally acceptable modification to the plan by December 1, 1971, in order to comply with the one-man, one-vote requirement. This Court, in denying a motion by plaintiffs for an injunction pending appeal, ordered the Board, upon approval of a plan by the district court, or not later than May 16, 1972, to hold final elections for the Board under a constitutionally acceptable plan. These orders are, of course, not at issue in this appeal.

concentration extending into the rural areas that border northwestern Natchez and comprise the northwestern corner of the county.

As late as 1970, the Board of Supervisors, the county's legislative body, was elected from five electoral districts which varied in population from 800 to 16,832. These districts were patently malapportioned. Redistricting was essential to a constitutionally valid election in November of 1970 under the one-man, one-vote mandate of *Reynolds v. Sims*, 1964, 377 U.S. 533. Accordingly, in January of 1970 the Board of Supervisors retained Comprehensive Planners, Inc. (CPI) to prepare a redistricting plan. The resulting plan was adopted by the Board on November 2 of that year. The Board submitted the plan to the Attorney General of the United States for his approval pursuant to § 5 of the Voting Rights Act of 1964, 42 U.S.C.A. § 1973(c). No objection was interposed.

Equality of population in electoral districts was a primary goal of the revision. Another objective, however, was the equalization of the responsibilities of each Supervisor in exercising their traditional function of highway and bridge maintenance. Thus, the Board instructed CPI not only to equate, as best it could, the population of the districts, but also the mileage of roads for county maintenance, and the square mile area of each district. With its land area largely rural, and its population concentrated in one urban area, the realization of these legitimate planning objectives dictated a plan which would consolidate urban and rural areas into each district. As the new plan

was developed, therefore, each district converged in spoke-like fashion from a broad rural base into the City of Natchez. This dissection of the population concentration of the county resulted in an equal allocation of the population of Natchez among the new districts. Under the population figures available to CPI in 1970, prior to the publication of the 1970 census, the result was a plan in which substantial equality of population was reached in districts that reflected cross sections of urban and rural land areas.

The allocation of the population concentration of the city resulted in the removal of some 7000 blacks from old Supervisor District Four, where prior to the implementation of the plan 60% of the blacks in the county lived and commanded a 75% population majority. These blacks, now residing in new districts other than Four, found themselves in electoral districts where blacks no longer represented a majority of the population. The reallocation of the population of Natchez, on the other hand, substantially balanced the racial ratio of the population in new Districts Three, 51% white, 49% black, and One, 55% white, 45% black, and resulted in a significant amelioration of the racial population disparities in the other two districts, although whites there continued to constitute a 60% - 40% population majority.

Plaintiffs object to the CPI plan as a racially motivated gerrymander, contending that as a result of the shift of a part of the highly concentrated black population of the county, the voting strength of blacks as a legally cognizable racial element was unconsti-

tutionally diluted and the effectiveness of their franchise correspondingly reduced. Their claim is essentially based upon the Equal Protection Clause of the Fourteenth Amendment. Specifically, plaintiffs argue that this dilution is represented by the difference in effective voting power blacks now command in Adams County, under the new plan, and the effective voting power blacks could command if the revision had been drawn to recognize their population segment of northwestern Adams County as numerically large enough, and geographically contiguous enough, to constitute two electoral districts in which blacks would retain a significant population majority. Further, as a side effect of the plan, it is urged that these blacks, Howard and Schoby included, who formerly were part of the majority class in old District Four, and now are a minority class in each of the new electoral districts, have suffered a more serious dilution of their voting power since they are "denied the right to vote in a district where they constituted a majority prior to the redistricting" and could "elect black candidates if they so chose."

A long line of cases beginning with *Grey v. Sanders*, 1963, 372 U.S. 368, and *Reynolds v. Sims, supra*, teaches that each citizen must have an equally effective voice in the election of his legislative representative by requiring substantial equality of population in electoral districts. Malapportionment, however, is not the only evil which this effectiveness guarantee is designed to combat. It is also aimed at the gerrymander. It is the gerrymander, not malapportionment, that is at issue in this appeal.

The gerrymander is as great a threat to equality of representation as malapportionment. While malapportionment generally emphasizes considerations of the weight of an individual's vote, a gerrymandering operates to destroy the effectiveness of the franchise by diluting the vote of recognizable racial, ethnic, or political groups in order to benefit a favored interest.

As we view the constitutional requirements in this area, to establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, *Wright v. Rockefeller*, 1964, 376 U.S. 52; *Gomillion v. Lightfoot*, 1960, 364 U.S. 339; *Sims v. Baggett*, M.D. Ala. 1965, 247 F. Supp. 96, or (2) that "... designedly or otherwise, a[n] ... apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson*, 1966, 384 U.S. 73, 88. *See Whitcomb v. Chavis*, 1971, 403 U.S. 124, 143-144, 149.[a]

First, a careful consideration of the record leaves us in complete agreement with the finding of the dis-

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[a]While the "dilution" test developed in *Burns*, and expanded in *Whitcomb*, is used in those cases to test the constitutionality of multi-member district plans, we have no hesitation in applying that test as a measure of the constitutionality of reapportionment plans involving only single-member districts. In each instance, we are required to determine the same question, whether or not there has been an unconstitutional manipulation of electoral district boundaries so as to minimize or dilute the voting strength of a minority class or interest.

trict court that plaintiffs failed to sustain their burden of proving that the CPI plan was the product of a racial motivation or purpose. *See Wright v. Rockefeller*, *supra*, 376 U.S. at 56. The record is bare of such evidence. The district court was correct in holding that CPI did not consider, nor were they instructed to consider, the racial makeup of the districts to be drawn.

Plaintiffs more forcefully urge that the new plan has resulted in an impermissible dilution of the voting strength of their class in violation of the rule established in *Burns*, *supra*. But following the change of district boundaries, blacks in District Four continue to enjoy a 67% population majority. Blacks in District Three command the same population percentage as do whites, and a population percentage greater than the percentage of population they represent county-wide. In District One, whites outnumber blacks by only 10%, 55% to 45%, and blacks again constitute about the same population ratio as they do county-wide. In Districts Two and Five blacks continue to remain in the minority, representing 40% of the population in each district. The obvious reason for this disparity is their continued enjoyment of a heavy population majority in District Four.

These considerations lead us to approve the finding of the district court that plaintiffs failed to sustain their burden of showing that the new plan is a constitutionally impermissible dilution, minimization, or cancellation of the voting strength of the black citizens of Adams County. *See Whitcomb v. Chavis*, *supra*, 403 U.S. at 144. On the contrary, we find that the plan passes constitutional muster. Further, we reject the

plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts. This rationale was rejected by Justice White for the majority in *Whitcomb*, saying that such a contention

> "...[is] expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization ... who live in what would be safe districts in a single member district system but who ... are submerged in a one-sided ... vote.
>
> .... [It] is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting and underrepresenting parties and interests ...

403 U.S. at 156, 160.

For the reasons already explicated, we reject the separate claim by Howard, Scboby, and the class they

represent that they have suffered a separate unconstitutional dilution by denial of the right to vote in a district where they constituted a majority class prior to redistricting. Inevitably, people of different races, national origins, and contrasting tenets will be shifted under reapportionment plans to districts in which they may no longer be in the clear majority. But when, as here, no racial motivation spawns a change of the voting area of those complaining, and the redistricting plan does not unconstitutionally dilute the voting strength of the complaining minority, there is no abridgment of voting rights.

AFFIRMED.

E. Denial of Petition for Rehearing *En Banc*.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2361

REVEREND LEON HOWARD and BARNEY SCHOBY, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants-
Cross Appellees,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER,

JAMES H. CARTER, IKE FOSTER AND ELMORE REE, as members of the Adams County Board of Supervisors,

Defendants-Appellees
Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 6, 1972, 5 Cir., 1972, ____ F.2d ____).

(February 25, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,
Petitioners,

vs.

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Argument 1-7
Certificate 8

Index of Authority

STATUTES

28 U. S. C. Section 1291 6

CASES

Bohms v. *Gardner*, 381 F. 2d 283 (C. A. 8th, 1967), Cert. Den. 88 S. Ct. 1069, 390 U. S. 964, 19 L. Ed. 2d 1164 (1967) 5, 6, 7
Catlin v. *U. S.*, 324 U. S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945) 6

In the Supreme Court of the United States

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The gravamen of Respondents' opposition to the Petition for Writ of Certiorari filed in this cause is simply that the appeal is premature and constitutes a piecemeal appeal not decisive of the primary issues involved. A chronology of this case will demonstrate why Respondents urge that this cause should not be reviewed at this time by the Court.

ONE: The United States District Court entered its order on July 27, 1971, providing that the primary elections to be held in Adams County, Mississippi would not be delayed, that said elections would be conducted pursuant to the redistricting plan under attack, that said plan was not racially discriminatory and further that Defend-

ant must, because of malapportionment of population of the Supervisors' Districts within the county, file with the District Court a constitutionally acceptable revised or modified redistricting plan not later than December 1, 1971.

TWO: Plaintiffs filed a motion with the United States Court of Appeals for the Fifth Circuit for an injunction pending appeal or alternatively to have their appeal heard expeditiously, which motion was denied. The Court of Appeals, however, on consideration only of the transcript of testimony and briefs, on the 29th day of July, 1971, entered its interlocutory judgment ordering that the District Court's judgment would "remain in full force and effect subject only to the provisions herein contained". The latter reference was to that portion of the order of the Court of Appeals which directed the District Court not later than May 16, 1972, to enter its order calling a new election at some time thereafter to be conducted under the Court's approved redistricting plan to be filed by Defendants by December 1, 1971.

The Court of Appeals then noted: ". . . *the District Court shall retain jurisdiction of this cause subject only to the provisions hereof,*" and, "We further note, however, that in the absence of the record we do not pass upon appellants' contention that the redistricting of Adams County 'was racially motivated and enacted for the purpose and effect of diluting the voting strength of black voters of Adams County, particularly those residing in old District 4, and of preventing the election of black candidates for office in Adams County.' *This contention will be considered when the case is finally submitted to this Court for hearing on the merits.*"

THREE: Within the time permitted by the Rules, Plaintiffs then prosecuted their appeal addressing it to the "racially discriminatory" feature of the case. Defendants

filed timely their motion to dismiss the appeal as moot, which contention the Court of Appeals dismissed by saying that:

> ". . . Appellees motion to dismiss the appeal, filed in the above styled and numbered cause is hereby denied for the reason that the relief granted in the order of July 29, 1971, was in aid of the appellate jurisdiction of this Court and should remain in effect pending the disposition of the appeal on the merits, which will follow in due course."

The appeal was heard, the case remanded to the summary docket and on January 6, 1972, the Court of Appeals (Gewin, Goldberg and Dyer, JJ.) rendered its decision affirming the decision of the District Court that the redistricting plan was not racially discriminatory. Plaintiffs' subsequent motion for rehearing or in the alternate for a rehearing en banc was denied by order of the Court of Appeals dated February 25, 1972.

FOUR: By motion dated March 1, 1972, Plaintiffs asked that the mandate to issue upon the Court's opinion be stayed pending determination of Petition for Writ of Certiorari. In said motion Plaintiffs describe the relief granted by the Court in its order of July 29, 1971, requiring new elections as *interlocutory*. Plaintiffs further urge that the stay be granted "with the understanding that the petition" will not disturb that interlocutory relief. Defendants-Appellees opposed the motion of Plaintiffs-Appellants for stay of the mandate on the opinion of January 6, 1972, and requested that the mandate on the opinion of July 29, 1971, be recalled in order to reinvest the Court of Appeals with jurisdiction of the entire cause. The Court of Appeals rejected both Plaintiffs-Appellants' motion for a stay of mandate and motion of Defendants-

Appellees for recall of the mandate by order filed March 15, 1972.

FIVE: As instructed by order of the Court of Appeals, Defendants on November 24, 1971, filed a new redistricting plan which complied with all of the constitutional standards. On December 6, 1971, Plaintiffs filed interrogatories addressed to Defendants. By order of the District Court dated January 7, 1972, Defendants' time to answer interrogatories was enlarged by thirty (30) days. The District Court set a pretrial conference on the new plan for the 24th day of January, 1972, at which time the case was continued pending filing of all pleadings. Defendants' answers to interrogatories were filed February 8, 1972. The case involving the new redistricting plan was again set for pretrial on May 2, 1972, and for trial on the merits on May 3, 1972. After trial on May 3, and 4, 1972, and May 9, 1972, the District Court rendered its opinion on May 15, 1972, in which the District Court found that the Defendants' December 1, 1971 redistricting plan has neither the purpose nor effect of being racially discriminatory nor does it dilute or disperse black population concentrations or voting majorities in a manner to be condemned as being a racial gerrymander and further that said plan meets the constitutional standards of the Supreme Court of the United States as announced in the one-man, one-vote decisions. A copy of the opinion of the District Court is attached hereto as Exhibit "A". The District Court's judgment has not yet issued.

The opinion of the District Court directs that the new supervisor elections be conducted under the Defendants' December 1, 1971 plan and that the election be held in conjuction with the November, 1972, general Congressional elections.

SIX: The posture of the entire case now is that jurisdiction of the racially discriminatory feature is with the Court of Appeals subject, however, to a determination of this Court as to whether the requested writ of certiorari will issue. Jurisdiction of the malapportionment count reposes with the District Court.

The District Court has approved, by opinion, Defendants' December 1, 1971 redistricting plan and directed Defendants to call elections for supervisors thereunder. The Court's judgment will shortly issue; thereafter the time for appeal will begin to run. An appeal from this latest decision in the case will present to this Court *all of the issues* involved in this case and will be determinative with finality of all of the rights of the parties.

To accept jurisdiction of only a fragment of the case, that is the racially discriminatory feature only, as requested by Petitioners, leaves undecided the principal issues of the litigation—whether the December 1, 1971 redistricting plan meets all of the constitutional standards as to discrimination and apportionment and whether supervisors must run again before the expiration of the terms of office to which they were elected in November, 1971. Additionally, it should be noted that the first redistricting plan under attack, that is the November 2, 1970 plan, has been discarded entirely and effectively voided for all purposes. Why should this Court now revive a moot issue and know that other important questions involved in the same litigation cannot, at the same time, be resolved?

Respondents submit that Petitioners' requested fragmentary appeal falls squarely within the language and sense of *Bohms* v. *Gardner*, 381 F. 2d 283 (C. A. 8th, 1967), Cert. Den. 88 S. Ct. 1069, 390 U. S. 964, 19 L. Ed. 2d 1164 (1967). There, an aggrieved applicant for disability insurance benefits under a Federal program, after pursuing

unsuccessfully all of the administrative reviews, filed his suit in the United States District Court to compel payment of the claimed benefits. The District Court remanded the case to the Secretary of Health, Education and Welfare for further proceedings but did not order the payment of benefits to Plaintiff. From the latter portion of the judgment the Plaintiff appealed. The Court of Appeals dismissed the appeal saying:

> "The district court merely vacated the Secretary's decision and remanded the case for reconsideration and possibly the reception of additional evidence." 381 F. 2d 285

The Court of Appeals utilized the language of the United States Supreme Court in *Catlin* v. *U. S.*, 324 U. S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945) in defining a final appeal from which an appeal can be taken:

> "A final decision generally is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment."

And

> "Although the Supreme Court has been liberal and pragmatic, and necessarily so, in its approach to this statute (28 U. S. C. Sec. 1291) and has given it a practical rather than a technical construction . . . finality . . . is the firmly established requirement." 381 F. 2d at 285.

Obviously, the purpose behing this rule is to prevent "piecemeal" or fragmentary appeals which, when taken and decided, will not reach all of the issues of the particular case. Unmistakably, the United States Supreme Court has refused to hear such appeals when this Court observed that by Title 28 U. S. C. Section 1291, "Congress has long

expressed a policy against piecemeal appeals." 381 F. 2d at 285.

In the case on Petition, only one issue will be presented to the Court—whether or not the already discarded November 2, 1970, redistricting plan is racially discriminatory. The other issues evolving from subsequent developments in the case cannot be reached. Assume arguendo, that this Court assumes jurisdiction of the case and reverses the Court of Appeals. In the meantime, substantial preparations for elections will have been made and possibly an election held. The decision then casts a cloud on that election and the redistricting plan under which it was held. The circle of litigation then would require a new redistricting plan and another set of elections, all to accommodate an appeal of a moot issue rather than waiting to hear an appeal of all of the issues which now can be prosecuted in about the same time.

Respondents, therefore, respectfully urge that issuance of the writ of certiorari to the Court of Appeals will permit a fragmentary, premature appeal of a moot issue.

Respectfully submitted,

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CERTIFICATE

Copy of the within and foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari was duly served on the Petitioners, by mailing postage prepaid to Mr. Frank R. Parker, Attorney at Law, 233 North Farish Street, Jackson, Mississippi 39201.

Done and certified this 25th day of May, 1972.

.....

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FILE COPY

JUN 10 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

A. THE CASE 1

B. MOOTNESS 4

C. PREMATURITY AND PIECEMEAL ADJUDICATION 10

D. SUMMARY 12

TABLE OF AUTHORITIES

Cases

Abate v. *Mundt*, 403 U.S. 182 (1971) 12

American Construction Co. v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372 (1893) 10

Beacon Theaters, Inc. v. *Westover*, 359 U.S. 500 (1959) 10

Burns v. *Richardson*, 384 U.S. 73 (1966) 12

Bussie v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), modified, ____ F.2d ____ (5th Cir. 1971), cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784) 13

Fortson v. *Dorsey*, 379 U.S. 433 (1965) 12

Gillespie v. *United States Steel Corp.*, 379 U.S. 145 (1964) 10

Klahr v. *Williams*, 313 F. Supp. 148 (D. Ariz. 1970), aff'd sub nom. *Ely* v. *Klahr*, 403 U.S. 108 (1971) 13

Land v. *Dollar*, 330 U.S. 731 (1947) 10

TABLE OF AUTHORITIES (Continued)

Page

League of Nebraska Municipalities v. *Marsh*, 242 F. Supp. 357 (D. Neb. 1965), appeal dismissed, 382 U.S. 1021 (1966) 13

Louisiana v. *United States*, 380 U.S. 145 (1965) 12

Sibron v. *New York*, 392 U.S. 40 (1968) 4

The Conqueror, 166 U.S. 100 (1897) 10

Troxler v. *St. John the Baptist Parish Police Jury*, 331 F. Supp. 222 (E.D. La. 1971) 13

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 10

United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 4, 5

United States v. *W. T. Grant Co.*, 345 U.S. 629 (1953) 9

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 4, 12

Wirtz v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463 (1968) 4

Statutes

42 United States Code

§ 1973(c) 2

§ 1971(a)(1) 2

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Petitioners file this reply brief pursuant to Rule 24(4) of the Rules of this Court in support of their petition and in response to respondents' brief in opposition to the petition.

A. THE CASE

This action challenges the redistricting by the defendants of the five supervisors' districts of Adams County, Mississippi, from which members of the county governing board are elected. The original complaint alleged that the redistricting plan adopted by the de-

fendants was invalid (1) for failure to obtain proper clearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), (2) because the redistricting plan was racially discriminatory in violation of rights secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1971(a) (1) and 1973, and (3) because the resulting districts failed to meet the one man, one vote requirements of the decisions of this Court, and thus violated rights secured by the Equal Protection Clause of the Fourteenth Amendment.

As to Count 2, plaintiffs requested by way of relief, inter alia, a declaratory judgment that the challenged redistricting plan (approved on November 2, 1970) was racially discriminatory (which would have had the effect of barring its use as the basis for future plans) and injunctive relief against the defendants enjoining them from future racial gerrymandering in redistricting the supervisors' districts of the county. The district court rejected plaintiffs' claims under Counts 1 and 2, but sustained plaintiffs' claims under Count 3 and ordered the defendants to file with the court a new redistricting plan by December 1, 1971 (App. 1a-51a).[1] Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit from the denial of relief under Count 2, defendants appealed from the granting of relief under Count 3, and the court of appeals affirmed the decision of the district court on both counts, and ordered new supervisors elections after a new redistricting plan had been approved by the district court (App. 52a-63a).

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[1]The abbreviation "App." refers to pages in the Appendix filed with the Petition.

Plaintiffs then filed with this Court a petition for a writ of certiorari to review the judgment of the court of appeals sustaining the denial of relief under Court 2, that is, sustaining the refusal of the district court to declare that the defendants' November 2, 1970 redistricting plan was racially discriminatory, to enjoin the defendants from future racial gerrymandering in redistricting, or to order new elections for other officials elected on the basis of supervisors' districts, viz., justices of the peace and constables, on the basis of districts which are not discriminatory or gerrymandered.

Defendants, respondents here, have filed a brief opposing the petition not on the merits, but on the grounds that the issues raised in the complaint are moot, that the petition is premature, and that the granting of the petition would result in piecemeal adjudication of issues which are no longer primary or decisive. They rest their contentions on acts and events occurring subsequent to the decision of the court of appeals but required by the decision of the district court and the court of appeals. Thus, they point out that pursuant to the decision of the district court as affirmed by the court of appeals, defendants filed before December 1, 1971, their revised redistricting plan apportioning the population among the five supervisors' districts of Adams County on a more equal basis, that a hearing has been held on the new plan (and on an alternative plan presented by the plaintiffs), and that the district court has approved defendants' revised redistricting plan and has ordered a special election for new county supervisors on November 7.

B. MOOTNESS

This action clearly is not moot. First, the district court in its Judgment of July 27, 1971, which plaintiffs appealed to the court of appeals, specifically retained jurisdiction of the action for purposes of a hearing on the new plan ordered by the court "and for other necessary relief" (App. 51a). If the case is subject to dismissal because of mootness, the usual practice of this Court "with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). If that occurred, this would require the decisions of the court of appeals (affirming the action of the district court and ordering new elections) and the district court to be vacated and the action dismissed. This would either require the defendants to revert back to their prior redistricting plan which was held to violate equal protection guarantees (since they enacted their new plan pursuant to the direction of the district court) or would allow the new plan to stand but without the requirement of new supervisors elections to cure the unconstitutionality of elections held on the basis of malapportioned districts (ordered by the court of appeals). Where substantial questions are presented, neither the enactment of a new apportionment plan nor even the holding of new elections render the underlying cause of action, or the questions presented, moot. *Whitcomb* v. *Chavis*, 403 U.S. 124, 140-41 (1971); *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463 (1968).

Second, the criminal cases which have come before this Court clearly state the principle that a cause is not moot if the decision from which review is sought continues to have collateral and adverse legal consequences. *Sibron* v. *New York*, 392 U.S. 40 (1968). This is particularly true where the decision below has the effect of *res judicata* in subsequent cases or, as here, in the same case. See *United States* v. *Munsingwear, Inc.*, supra.

After the decision of the court of appeals, the defendants filed with the district court, not a new redistricting plan, but merely a revision of the previous plan adjusting the boundary lines to more nearly equalize the population of the five supervisors' districts. Having filed a revised plan based on the plan which was upheld by the court of appeals (and of which review is sought in this Court), the defendants then argued in the district court that because of the decision of the court of appeals the plaintiffs were foreclosed from challenging the new plan either on the methodology used or on grounds of racial gerrymandering: "Defendants urge that their plan must be accepted by [the district court] for the reasons that it clearly and undisputably complies with the directives of the Court of Appeals and is founded upon a method or procedure which specifically has the approval of the Court of Appeals." Memorandum Brief of Defendants, p. 2.

The plan presented by the defendants, as before, split Census enumeration districts and abandoned historic district boundary lines, combined portions of heavily black Natchez with portions of the heavily white rural

area outside Natchez in each new district, provided for only one black majority district of the five new districts in a county which is 47.9 percent black, and provided for new districts unequal in population with a population span of 214 persons and a percentage span of 2.86 percentage points of variance. The new district boundary lines in the county outside of Natchez remained unchanged, except for the boundary line between Districts One and Two (see Petition, p. 15, county map). Also as before the boundaries of defendants' proposed districts within the City of Natchez were not compact and the location of the new lines show an intentional dilution of the voting strength of the black population concentration in the northern part of the city formerly included within old District Four (see Petition, p. 13, Figure 1):

Figure 1. Map showing the boundaries of the new supervisors' districts (beats) within the City of Natchez as established by the defendants' 1971 redistricting plan approved by the district court in its Opinion of May 15, 1972, superimposed on 1970 Census enumeration districts shaded for racial percentage (compare with map in Petition, p. 14, Figure 2). The "Z" marks indicate instances in which the new boundaries split up 1970 Census enumeration districts.

On the other hand, plaintiffs presented to the district court an alternative redistricting plan which generally corresponded to the theory expressed at the first hearing — that it was possible to carve two new districts out of old District Four without dispersing or diluting the concentration of black population residing in that district (Petition, pp. 8, 9). Plaintiffs' proposed alternative redistricting plan did not split any Census enumeration districts and retained the historic and previously exsting district boundary lines to the extent possible, did not divide the black population concentration in the northern part of the City of Natchez among all five districts (as did defendants' plan), provided for two black majority districts, provided districts which were compact and composed of contiguous territory, and surpassed the defendants' plan in providing equality of population among the five districts by providing for a population of span of only 134 persons, and by providing five districts all of which had less than 1 percentage point of variance and a total span of 1.79 percentage points.

Plaintiffs challenged defendants' plan on grounds of racial gerrymandering and malapportionment, but the district court, considering itself bound by the decision of the court of appeals now up for review, specifically approved and endorsed the 'defendants' plan and ordered it into effect. In particular, the district court expressed the view that it was foreclosed from examining defendants' new plan for any evidence of racial gerrymandering because of the instant decision of the court of appeals: "The Appellate Court likewise put to rest plaintiffs' contention that the configuration of the supervisory districts, extending spoke-like out

from the City of Natchez was an intent to gerrymander." Opinion of May 15, 1972, p. 8.

Because the decision of the court of appeals from which petitioners seek leave to appeal by way of certiorari was interpreted by the district court to have controlling legal effect and adverse legal consequences upon petitioners' contentions in subsequent proceedings in this case, the issues presented are not moot.

Third, a case is not moot if the "defendant is free to return to his old ways" and "there exists some cognizable danger of recurrent violation" of the law. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953). If this Court finds that the court of appeals was in error, and that defendants' November 2, 1970 redistricting plan did include the salient characteristics of a racial gerrymander (Petition, pp. 23, 24), then plaintiffs should be entitled to future relief, as prayed for in the complaint, for a declaratory judgment disapproving the old plan on racial grounds, for an injunction against future gerrymandering, and for new elections for all district officers. Mere voluntary cessation of illegal conduct, or as plaintiffs contend here, subsequent illegal conduct which conforms to the past discrimination, does not render moot a suit for declaratory and injunctive relief if it is possible for the defendant to resume (or continue) such unlawful conduct. *United States* v. *W. T. Grant Co.*, supra.

C. PREMATURITY AND PIECEMEAL ADJUDICATION

This Court frequently has held that it is not a sufficient jurisdictional objection to a petition for a writ of certiorari that "the appeal is premature and constitutes a piecemeal adjudication," Brief of Respondents, p. 1, since the contention that the decision below lacks finality is no bar to the exercise of this Court's jurisdiction to review cases from the courts of appeals. As long as a timely petition for certiorari is filed, this Court has jurisdiction to take the case whatever its status in the lower courts. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 145, 153 (1964); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *The Conqueror*, 166 U.S. 110, 113 (1897); *American Construction Co.* v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372 (1893); see R. Stern and E. Gressman, SUPREME COURT PRACTICE 26-27 (4th ed. 1969). The jurisdictional statute invoked here, 28 U.S.C. § 1254(1) (and not 28 U.S.C. § 1291 erroneously relied upon by the respondents, Brief for Respondents, p. 6), allows review of any "cases in the courts of appeals . . . before or after rendition of judgment or decree," and there is no jurisdictional requirement of finality of adjudication.

Assuming that considerations of finality enter into the discretionary decision whether or not to grant certiorari, and petitioners have no doubt that they do, Stern and Gressman, supra, 180, this Petition is not premature and the issuance of the writ would not constitute piecemeal adjudication of the case for essentially the same reasons stated in the previous section. The decision of the court of appeals is a final decision

as to the racially discriminatory aspects of the November 2, 1970 redistricting plan, although we contest defendants' frequently repeated contentions that the court of appeals decision foreclosed further inquiry into the racially discriminatory aspects of the subsequent revised plan. The court of appeals' decision was a final adjudication both on the question of malapportionment and on the question of racial discrimination. The order issued by the district court which was appealed to the court of appeals was a final order determining the rights of the parties for the 1971 primary and general elections in Adams County, Mississippi and the future rights of the plaintiffs with regard to their entitlement to a new plan which more nearly equalized the population as among the five districts.

The interests of all parties concerned, and indeed the interests of black voters and political bodies throughout the State of Mississippi, would best be served by prompt adjudication of the issues presented. As indicated above, these issues already have arisen a second time in this very case, and there are many cases currently pending in Mississippi raising these very same issues. The planning agent of the defendants, Comprehensive Planners, Inc., already has completed or is undertaking redistricting in 42 counties in the state, and many of the redistricting plans which have been completed in those counties raise the very same questions regarding dispersal of the black population, the burden of proof after use of a racial classification and a disproportionate burden on voting strength have been shown, etc., presented here.

D. SUMMARY

The issues presented in the instant Petition go to the heart of the electoral process and the duty of political subdivisions with a past history of racial discrimination to remedy that discrimination and the duty of Federal courts "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). This Court repeatedly has emphasized that apportionment schemes are unconstitutional when they "designedly or otherwise . . . operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971). Similarly, this Court has ordered strict scrutiny of apportionment schemes to determine whether the plan "was designed to favor particular groups," *Abate* v. *Mundt*, 403 U.S. 182, 186 (1971).

What is the meaning of the frequently used word "minimize," cited above? If it is feasible to redistrict a 50 percent black county in Mississippi to provide two black majority districts and still meet the criteria of population equality, compactness, and preserving historic boundary lines and neighborhood areas, doesn't a redistricting plan which provides only one black majority district "minimize" black voting strength?

Doesn't a redistricting plan which disperses concentrations of black population among areas of white population concentration, under the circumstances of ra-

cial bloc voting, "cancel out" the voting strength of racial elements, as the district courts in Louisiana repeatedly have held? See *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 457 (E.D. La. 1971), modified, ____F.2d____ (5th Cir. 1971), cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784); *Troxler* v. *St. John the Baptist Parish Police Jury*, 331 F. Supp. 222 (E.D. La. 1971).

Doesn't a redistricting plan which consciously and intentionally has been drawn to protect the positions of white incumbents in a bi-racial county with a past history of voting discrimination "designedly . . . favor particular groups"? See *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), aff'd sub nom. *Ely* v. *Klahr*, 403 U.S. 108 (1971); *Bussie* v. *Governor of Louisiana*, supra; *League of Nebraska Municipalities* v. *Marsh*, 242 F. Supp. 357, 360 (D. Neb. 1965), appeal dismissed, 382 U.S. 1021 (1966).

This action was filed in reliance on the promise given by this Court in the cited cases, and petitioners urgently submit that the redistricting here at issue meets the criteria of invidious discrimination set out in those cases. If that promise is not fulfilled, and the criteria not given full recognition, then the newly enfranchised black voters of Mississippi will have every reason to become disillusioned with the political system held out as the means of fulfilling the goal of equality in America. If relief is not granted, the rights of black voters to full, equal, and effective participation in the political process — secured in the post-Civil War Constitutional Amendments and guaranteed in the Civil Rights Acts of 1957, 1960, 1964, and the Voting Rights

Act of 1965 — will merely become another promise unfulfilled and another dream deferred. Petitioners urge that the Petition be granted.

Respectfully submitted,

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